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2004-05 TERM



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# Decisions of the United States Supreme Court

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## 2004-05 TERM

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by  
The Editorial Staff  
United States Supreme Court Reports,  
Lawyers' Edition



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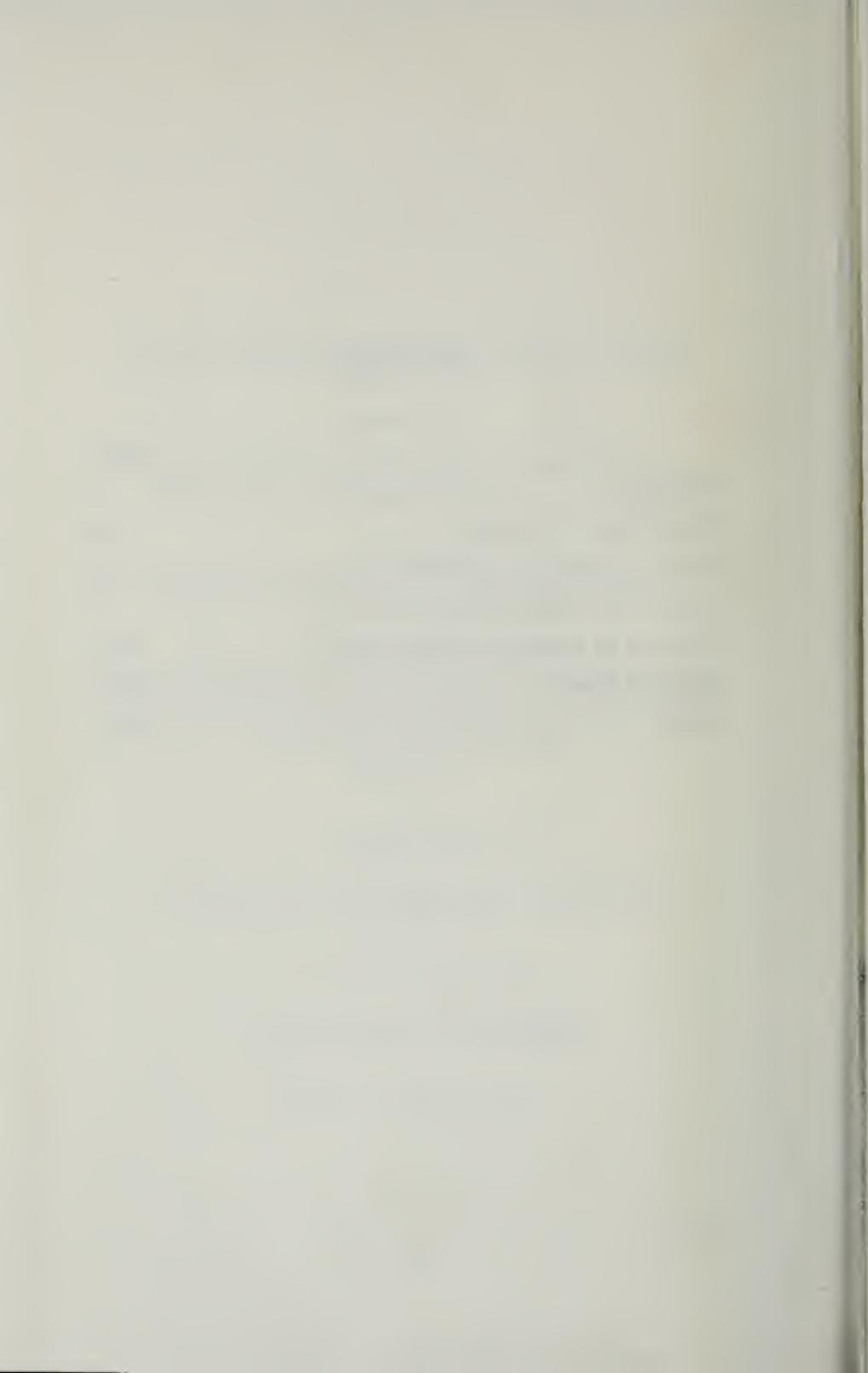
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## PREFACE

This volume is designed to serve as a quick-reference guide to the work of the United States Supreme Court during its 2004–2005 Term. Its important features are described below.

**The Court's Personnel.** A list of the Justices of the Supreme Court is accompanied by photographs and biographical sketches of each Justice serving during the Term.

**Survey of the Term.** A succinct narrative statement outlines the high spots of the Term.

**Summaries of Decisions.** Every important decision of the Supreme Court is individually summarized. These summaries (reprinted from Vols. 160–162, Part 2, L Ed 2d) describe the manner in which the case came before the Court, the facts involved and issues presented, the holding of the Court and the reasons supporting that holding, the name of the Justice who wrote the opinion of the majority, and the names and views of those of the Justices who concurred or dissented.

The Summaries are printed in the order in which the cases were decided by the Court. Notations to Summaries indicate the volume and page at which the full opinion of the Court may be found in the official reports (US) published by the Federal Government, and the privately published United States Supreme Court Reports, Lawyers' Edition (L Ed 2d), and Supreme Court Reporter (S Ct).

Following each Summary is a listing of the attorneys who argued in behalf of the litigants.

## PREFACE

**Glossary.** A glossary of common legal terms defines, in simple, nontechnical language, various legal words and phrases frequently used in the Supreme Court's decisions.

**Table of Cases.** A complete Table of Cases makes possible the location of the Summary of any case through the name of a party litigant.

**Index.** A detailed, alphabetical word index makes possible the location of the Summary of any case by consulting the index entries for appropriate factual and conceptual terms.

## **THE COURT'S PERSONNEL**

**JUSTICES**  
OF THE  
**SUPREME COURT OF THE UNITED STATES**

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**2004–05 Term**

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**Chief Justice**

HON. WILLIAM H. REHNQUIST

**Associate Justices**

HON. JOHN P. STEVENS

HON. SANDRA DAY O'CONNOR

HON. ANTONIN SCALIA

HON. ANTHONY M. KENNEDY

HON. DAVID H. SOUTER

HON. CLARENCE THOMAS

HON. RUTH BADER GINSBURG

HON. STEPHEN BREYER

## BIOGRAPHIES OF THE JUSTICES

**Chief Justice Rehnquist** was born in Milwaukee, Wisconsin, on October 1, 1924, the son of William B. and Margery P. Rehnquist. He married Natalie Cornell in 1953. They had three children, James, Janet, and Nancy.



Chief Justice Rehnquist attended public schools in Shorewood, Wisconsin, and received his B.A. degree, with great distinction, and an M.A. degree from Stanford University in 1948. He also earned an M.A. degree from Harvard University in 1950, and then returned to Stanford University, where he received his LL.B. degree in 1952.

From 1952 to 1953, he served as law clerk for Justice Robert H. Jackson, Supreme Court of the United States. From 1953 to 1969, Chief Justice Rehnquist engaged in private practice in Phoenix, Arizona, and in 1969, he was appointed Assistant Attorney General, Office of Legal Counsel, by President Nixon.

Chief Justice Rehnquist served in the United States Army Air Corps in this country and overseas from 1943 to 1946, and was discharged with the rank of sergeant.

Chief Justice Rehnquist was nominated to the position of Associate Justice of the United States Supreme Court by President Nixon on October 21, 1971, and took office on January 7, 1972. On June 17, 1986, he was nominated Chief Justice by President Reagan, and

## PERSONNEL

on September 26, 1986, he was sworn in as Chief Justice.

Chief Justice Rehnquist's professional activities included membership in the American Bar Association, the Arizona Bar Association, the Maricopa County (Arizona) Bar Association (President, 1963), the National Conference of Lawyers and Realtors, the National Conference of Commissioners of Uniform State Laws, and the Council of the Administrative Conference of the United States.

Chief Justice Rehnquist died on September 3, 2005.

## PERSONNEL

**Justice Stevens** was born in Chicago, Illinois, on April 20, 1920. He is married to Maryan Mulholland Stevens

and has four children, John Joseph, Kathryn Stevens Tedlicka, Elizabeth Jane, and Susan Roberta.



Justice Stevens received an A.B. degree from the University of Chicago in 1941 and a J.D. degree, magna cum laude, from Northwestern University School of Law in 1947.

During the 1947-1948 Term of the United States Supreme Court, he was a law clerk to Justice Wiley Rutledge, and in 1949, he was admitted to practice law in Illinois. In 1951 and 1952, Justice Stevens was Associate Counsel to the Subcommittee on the Study of Monopoly Power of the Judiciary Committee of the United States House of Representatives, and from 1953 to 1955 he was a member of the Attorney General's National Committee to Study Anti-trust Law. From 1970 to 1975 he served as a Judge of the United States Court of Appeals for the Seventh Circuit.

Justice Stevens served in the United States Navy from 1942 to 1945.

Justice Stevens was appointed to the position of Associate Justice of the United States Supreme Court by President Ford on December 1, 1975, and took his seat on December 19, 1975.

Justice Stevens is a member of the Illinois Bar Association, Chicago Bar Association, Federal Bar Association, American Law Institute, and American Judicature Society.

## PERSONNEL

**Justice O'Connor** was born in El Paso, Texas, on March 26, 1930, the daughter of Harold A. Day and Ada Mae Wilkey Day. She married John Jay O'Connor III in 1952. They have three children, Scott, Brian, and Jay.



Justice O'Connor graduated from Stanford University in 1950 with a B.A. degree, magna cum laude. She earned her LL.B. degree at Stanford in 1952.

Justice O'Connor served as a deputy county attorney in San Mateo County, California, from 1952 to 1953, and as a civilian attorney for the Quartermaster Market Center in Frankfurt, Germany, from 1954 to 1957. She was in the private practice of law in Maryvale, Arizona, from 1958 to 1960, and served as an Assistant Attorney General in Arizona from 1965 to 1969.

Justice O'Connor was a member of the Arizona State Senate from 1969 to 1975. She was a judge of the Maricopa County Superior Court in Phoenix, Arizona, from 1975 to 1979, and served on the Arizona Court of Appeals from 1979 to 1981.

Justice O'Connor was appointed to the position of Associate Justice of the United States Supreme Court by President Reagan on July 7, 1981, and took office on September 25, 1981.

On July 1, 2005, Justice O'Connor sent a letter notifying the President of the United States of her retirement from the Supreme Court, effective upon the nomination and confirmation of her successor.

## PERSONNEL

**Justice Scalia** was born on March 11, 1936 in Trenton, New Jersey. He married Maureen McCarthy, September 10, 1960. They have nine children: Ann Forrest, Eugene, John Francis, Catherine Elisabeth, Mary Clare, Paul David, Matthew, Christopher James, and Margaret Jane.



Justice Scalia attended Georgetown University and University of Fribourg (Switzerland), receiving his A.B. degree in 1957. He earned his LL.B. de-

gree in 1960 from Harvard University.

Justice Scalia was admitted to the Ohio Bar, 1962, and the Virginia Bar, 1970. He was in private practice with Jones, Day, Cockley and Reavis, Cleveland, Ohio, from 1961 to 1967.

He served as general counsel, Office of Telecommunications Policy, Executive Office of the President, 1971 to 1972; chairman, Administrative Conference of the United States, 1972 to 1974; Assistant Attorney General, Office of Legal Counsel, U. S. Department of Justice, 1974 to 1977.

Justice Scalia was a professor of law at the University of Virginia from 1967 to 1974, a scholar in residence at the American Enterprise Institute in 1977, visiting professor of law at Georgetown University in 1977, professor of law at the University of Chicago from 1977 to 1982, and visiting professor of law at Stanford University from 1980 to 1981.

From 1982 to 1986, Justice Scalia served as a Judge of the United States Court of Appeals for the District of Columbia Circuit. He was nominated by President

## **PERSONNEL**

Reagan as Associate Justice of the United States Supreme Court, and he took the oath of office on September 26, 1986.

## PERSONNEL

**Justice Kennedy** was born in Sacramento, California, on July 23, 1936. He married Mary Davis on June 29,

1963, and they have three children, Justin Anthony, Gregory Davis, and Kristin Marie.



Justice Kennedy attended Stanford University and the London School of Economics, receiving a B.A. from Stanford in 1958. He then earned an LL.B. from Harvard Law School in 1961. From 1960 to 1961, he was on the board of student

advisors, Harvard Law School.

Justice Kennedy was admitted to the California bar in 1962 and the United States Tax Court bar in 1971. From 1961 to 1963, he was an associate at Thelen, Marrin, Johnson & Bridges, San Francisco, then practiced as a sole practitioner in Sacramento from 1963 to 1967, and was a partner in Evans, Jackson & Kennedy, Sacramento, from 1967 to 1975. He was nominated to be a judge of the United States Court of Appeals for the Ninth Circuit by President Ford, and took the oath of office on May 30, 1975. In addition, Justice Kennedy has been a professor of constitutional law at McGeorge School of Law, University of the Pacific, from 1965 to 1988.

He has served in the California Army National Guard, 1961; the Judicial Conference of the United States Advisory Panel on Financial Disclosure Reports and Judicial Activities (subsequently renamed the Advisory Committee on Codes of Conduct), 1979 to 1987; and the board of the Federal Judicial Center, 1987 to 1988. He has been on the Committee on Pacific Territories, 1979 to 1988, and was named chairman 1982. He is a member of the American Bar Association,

## PERSONNEL

Sacramento County Bar Association, State Bar of California, and Phi Beta Kappa.

Justice Kennedy was nominated by President Reagan as an Associate Justice of the Supreme Court, and took the oath of office on February 18, 1988.

## PERSONNEL

**Justice Souter** was born in Melrose, Massachusetts on September 17, 1939, the son of Joseph Alexander and Helen Adams Hackett Souter.



in 1989.

He graduated from Harvard College in 1961 with an A.B. degree. After two years as a Rhodes Scholar, Justice Souter received an A.B. in Jurisprudence from Oxford University in 1963. He earned an LL.B. degree from Harvard Law School in 1966 and an M.A. degree from Oxford University

Justice Souter was an associate at the law firm of Orr and Reno in Concord, New Hampshire from 1966 to 1968. He then became an Assistant Attorney General of New Hampshire. In 1971, he became Deputy Attorney General, and in 1976, Attorney General of New Hampshire. Justice Souter was named Associate Justice of the Superior Court of New Hampshire in 1978. In 1983, he was appointed as an Associate Justice of the Supreme Court of New Hampshire.

On May 25, 1990, Justice Souter became a Judge of the United States Court of Appeals for the First Circuit. He was nominated by President Bush as an Associate Justice of the United States Supreme Court, and he took his seat on October 9, 1990.

Justice Souter is a member of the National Association of Attorneys General, the New Hampshire Bar Association, and the American Bar Association.

## PERSONNEL

**Justice Thomas** was born in Pinpoint, Georgia on June 23, 1948. He married Virginia Lamp on May 30, 1987, and has one child, Jamal Adeen.



Justice Thomas attended Conception Seminary and Holy Cross College, receiving an A.B. degree, cum laude, from Holy Cross in 1971. He earned a J.D. degree from Yale Law School in 1974.

He was admitted to the Missouri Bar in 1974, and after serving as Assistant Attorney General of Missouri from 1974 to 1977, he was an attorney for the Monsanto Company from 1977 to 1979.

Justice Thomas served as a legislative assistant to Senator John C. Danforth of Missouri from 1979 to 1981, before serving as Assistant Secretary for Civil Rights for the United States Department of Education from 1981 to 1982 and Chairman of the United States Equal Employment Opportunity Commission from 1982 to 1990.

On March 12, 1990, Justice Thomas became a Judge of the United States Court of Appeals for the District of Columbia Circuit. He was nominated by President Bush as Associate Justice of the United States Supreme Court, and he took the oath of office on October 23, 1991.

## PERSONNEL

**Justice Ginsburg** was born in Brooklyn, New York, on March 15, 1933, the daughter of Nathan Bader and Celia Amster Bader. She married Martin D. Ginsburg in 1954, and they have two children, Jane and James.



She received a B.A. degree, with high honors in Government and distinction in all subjects, from Cornell University in 1954. She attended Harvard Law School and Columbia Law School, receiving her L.L.B. degree from Columbia in 1959.

Justice Ginsburg was admitted to the New York Bar in 1959 and the District of Columbia Bar in 1975. She served as a law clerk for Judge Edmund L. Palmieri of the United States District Court for the Southern District of New York from 1959 to 1961.

Justice Ginsburg was a professor at the Rutgers University School of Law from 1963 to 1972 and at Columbia Law School from 1972 to 1980. In addition, she served the American Civil Liberties Union as general counsel from 1973 to 1980 and as a member of the national board of directors from 1974 to 1980.

On June 30, 1980, Justice Ginsburg became a Judge of the United States Court of Appeals for the District of Columbia Circuit. She was nominated by President Clinton as an Associate Justice of the United States Supreme Court, and she took the oath of office on August 10, 1993.

## PERSONNEL

**Justice Breyer** was born in San Francisco, California, on August 15, 1938. He married Joanna Hare on September 4, 1967, and they have three children, Chloe, Nell, and Michael.



Justice Breyer received an A.B. degree, with Great Distinction, from Stanford University in 1959. He attended Oxford University as a Marshall Scholar and received a B.A. degree, with 1st Class Honors, in 1961. He earned his LL.B. degree from Harvard Law School, magna cum laude, in 1964.

During the 1964-1965 Term of the United States Supreme Court, he served as clerk to Justice Arthur Goldberg. He served as Special Assistant to the Assistant Attorney General (Antitrust), Department of Justice, 1965 to 1967; Assistant Special Prosecutor, Watergate Special Prosecution Force, 1973; Special Counsel to the U.S. Senate Judiciary Committee, 1974 to 1975; and Chief Counsel to the U.S. Senate Judiciary Committee, 1979 to 1980.

At Harvard University, Justice Breyer was an assistant professor from 1967 to 1970, a professor of law from 1970 to 1980, a professor at the Kennedy School of Government from 1977 to 1980, and a lecturer since 1980. He was a visiting professor at the College of Law, Sydney, Australia, in 1975, and the University of Rome in 1993.

He was appointed to the United States Court of Appeals for the First Circuit in 1980, and served as Chief Judge of that Court from 1990 to 1994. He was nominated by President Clinton as Associate Justice of the United States Supreme Court and took office on August 3, 1994.

## **SURVEY OF THE 2004-2005 TERM**

*by*

*Daniel A. Klein, J.D.*

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### **§ 1. Generally; statistics**

The Supreme Court's 2004-2005 Term began on October 4, 2004. The court took a recess from June 28 until October 3, 2005, at which time the 2004-2005 Term adjourned.

Statistics released by the Office of the Clerk of the Supreme Court show that (1) 8,588 cases appeared on the Supreme Court's docket for the 2004-2005 Term; and (2) of these, 1,092 were carried over from the prior term, and 7,496 were docketed during the 2004-2005 Term.

Of the 8,588 cases on the docket during the 2004-2005 Term, 6,590 nonoriginal cases were disposed of by (1) the court's denial of review, (2) the court's dismissal, or (3) withdrawal. Another 826 nonoriginal cases were summarily decided. A total of 1,046 cases, including 4 original cases, were not acted upon, or remained undisposed of.

There were 128 cases available for argument during the 2004-2005 Term, of which 87 cases were argued. Of the argued cases, 85 were disposed of by signed opin-

ion, 2 were disposed of by per curiam opinion, and none were set for reargument.

On July 1, 2005, Justice Sandra Day O'Connor sent a letter notifying the President of the United States of her retirement from the Supreme Court, effective upon the nomination and confirmation of her successor. Justice O'Connor, the first woman to serve on the Supreme Court, was sworn in on September 25, 1981.

Also, Chief Justice William H. Rehnquist died on September 3, 2005. He was nominated as an Associate Justice in 1971 and took his seat on January 7, 1972. He was nominated as Chief Justice in 1986 and sworn into that office on September 26, 1986.

## § 2. Landmark decisions

During the 2004-2005 Term, the United States Supreme Court handed down a number of well-publicized decisions. In one of the most widely discussed cases, the Justices held that a proposed disposition of private property to increase tax revenues and revitalize an economically distressed city qualified as a “public use” within meaning of takings clause of Federal Constitution’s Fifth Amendment. Thus, it was held that the city was permitted to use the power of eminent domain to acquire some of the property in question under a comprehensive development plan that included a variety of commercial, residential, and recreational land uses, even though the city was not planning to open the land—at least not in its entirety—to use by the general public (*Kelo v City of New London* (2005, US) 162 L Ed 2d 439, 125 S Ct 2655, *infra* § 41).

Also attracting national attention was a pair of cases concerning public displays of the Ten Commandments. In one of these cases, five members of the court—although unable to agree on an opinion—held that the establishment of religion clause of the Federal

Constitution's First Amendment was not offended by the display, on the grounds of the Texas state capitol, of a granite monument with the text of the Ten Commandments, where (1) the monument had been presented by a private civic organization in order to highlight the Ten Commandments' role in shaping civic morality; (2) the capitol grounds contained 17 monuments and 21 historical markers said to commemorate the "people, ideals, and events that compose Texan identity"; and (3) the monument had been in place for 40 years (*Van Orden v Perry* (2005, US) 162 L Ed 2d 607, 125 S Ct 2854, *infra* § 36). However, a different group of five Justices agreed that a lower federal court had properly enjoined Ten Commandments displays in two Kentucky county courthouses as violative of the establishment of religion clause, where the majority concluded that under the circumstances presented, (1) two previous versions of the displays had presented a predominantly religious purpose, and (2) there was adequate evidence that the counties' purpose had not changed at the third stage (*McCreary County v ACLU* (2005, US) 162 L Ed 2d 729, 125 S Ct 2722, *infra* § 36).

In another case involving church-and-state issues, the Supreme Court held that § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (42 USCS § 2000cc-1)—which barred the imposition of a substantial governmental burden on the religious exercise of a person residing in or confined to an institution, unless the burden furthered a compelling governmental interest and did so by the least restrictive means—did not violate the establishment of religion clause (*Cutter v Wilkinson* (2005, US) 161 L Ed 2d 1020, 125 S Ct 2113, *infra* § 36).

Some noteworthy cases from the 2004–2005 Term dealt with issues of criminal law. With respect to the

Federal Sentencing Guidelines (18 USCS Appx)—which (1) were authorized by the Federal Sentencing Act (18 USCS §§ 3551 et seq.), and (2) under some circumstances, resulted in a federal judge imposing a sentence that exceeded the maximum allowed by the Guidelines on the basis of the facts found by the jury—the Supreme Court held that (1) the right to a trial by jury under the Federal Constitution’s Sixth Amendment applied to the Guidelines; (2) two of the Act’s provisions—18 USCS § 3553(b)(1), which made the Guidelines mandatory on judges, and 18 USCS § 3742(e), which depended on the Guidelines’ mandatory nature—violated the Sixth Amendment; and (3) with these provisions severed, the Act made the Guidelines effectively advisory rather than mandatory (*United States v Booker* (2005, US) 160 L Ed 2d 621, 125 S Ct 738, *infra* § 39).

In addition, the court held that the proscription against cruel and unusual punishment in the Federal Constitution’s Eighth Amendment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age (*Roper v Simmons* (2005, US) 161 L Ed 2d 1, 125 S Ct 1183, *infra* § 39). In so holding, the court characterized as “no longer controlling” the previous decision in *Stanford v Kentucky* (1989) 492 US 361, 106 L Ed 2d 306, 109 S Ct 2969, reh den 492 US 937, 106 L Ed 2d 635, 110 S Ct 23, in which it had been held that imposition of the death penalty on offenders for murders committed at 16 and 17 years of age did not constitute cruel and unusual punishment.

Congress’ authority under the Federal Constitution’s commerce clause (Art I, § 8, cl 3) was held to include the power to prohibit the local cultivation and use of marijuana in compliance with California’s “Compassionate Use Act,” which had purported to authorize

limited marijuana use for medicinal purposes (*Gonzales v Raich* (2005, US) 162 L Ed 2d 1, 125 S Ct 2195, *infra* § 29). In addition, the Supreme Court struck down—as discriminating against interstate commerce in violation of the commerce clause—laws in Michigan and New York that were designed to (1) allow in-state wineries to sell wine directly to consumers in the state but to prohibit out-of-state wineries from doing so, or (2) make such direct sales impractical from an economic standpoint (*Granholm v Heald* (2005, US) 161 L Ed 2d 796, 125 S Ct 1885, *infra* § 47).

During the 2004–2005 Term, the court addressed various issues in antidiscrimination law. For instance, it was held that a coach who had been fired after complaining about sex discrimination against his girls' high school basketball team had the right to bring a private action—under Title IX of the Education Amendments of 1972 (20 USCS §§ 1681 et seq.)—against the local board of education for alleged retaliation (*Jackson v Birmingham Bd. of Educ.* (2005, US) 161 L Ed 2d 361, 125 S Ct 1497, *infra* § 40). Also, the Age Discrimination in Employment Act of 1967 (ADEA) (29 USCS §§ 621 et seq.) was held to recognize claims brought under a “disparate impact” theory of recovery (*Smith v City of Jackson* (2005, US) 161 L Ed 2d 410, 125 S Ct 1536, *infra* § 3; and the Supreme Court indicated that some aspects of the operation of foreign-flag cruise ships in United States waters were covered by Title III of Americans with Disabilities Act of 1990 (42 USCS §§ 12181 et seq.) (*Spector v Norwegian Cruise Line Ltd.* (2005, US) 162 L Ed 2d 97, 125 S Ct 2169, *infra* § 12).

With respect to racial discrimination, the Supreme Court held that a California corrections policy, under which prisoners were racially segregated in double cells in reception centers for up to 60 days each time that the prisoners entered a new correctional facility, was sub-

ject to strict scrutiny to determine whether there had been a violation of the equal protection clause of the Federal Constitution's Fourteenth Amendment; however, the court did not decide whether the policy violated the equal protection clause (*Johnson v California* (2005, US) 160 L Ed 2d 949, 125 S Ct 1141, *infra* § 35).

In another significant holding, the Supreme Court concluded that a husband and wife who had filed for bankruptcy were entitled to exempt assets in their Individual Retirement Accounts (IRAs) from their bankruptcy estate under a provision of the Bankruptcy Code (11 USCS § 522(d)(10)(E)) (*Rousey v Jacoway* (2005, US) 161 L Ed 2d 563, 125 S Ct 1561, *infra* § 9.)

Of particular interest to the computer industry were two decisions issued during the 2004-2005 Term. In a case involving some distributors of free software products which allowed computer users to share electronic files through "peer-to-peer" networks, the Supreme Court held that the distributors could be liable for contributory copyright infringement, regardless of the software's lawful uses, as there was evidence that the software was distributed with the principal, if not exclusive, object of promoting its use to infringe copyright (*MGM Studios Inc. v Grokster, Ltd.* (2005, US) 162 L Ed 2d 781, 125 S Ct 2764, *infra* § 10). Another case upheld the Federal Communications Commission's conclusion that broadband cable modem companies were exempt from mandatory common-carrier regulation under the Communications Act of 1934, as amended by provisions including the Telecommunications Act of 1996 (47 USCS §§ 151 et seq.) (*Nat'l Cable & Telecomms. Ass'n v Brand X Internet Servs.* (2005, US) 162 L Ed 2d 820, 125 S Ct 2688, *infra* § 43).

### § 3. Age discrimination

The Supreme Court held that (1) the “disparate impact” theory of recovery, previously announced for claims under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), was cognizable for claims brought under the Age Discrimination in Employment Act of 1967 (ADEA) (29 USCS §§ 621 et seq.); but (2) the scope of disparate-impact liability was narrower under the ADEA than under Title VII; and (3) in the case at hand, the claimants—some city police and public-safety officers who contended that certain salary increases had violated the ADEA by being less generous to officers over the age of 40—had not set forth a valid disparate-impact claim, as the revision of the pay plan in question was based on a reasonable factor other than age. [Smith v City of Jackson (2005, US) 161 L Ed 2d 410, 125 S Ct 1536.]

### § 4. Agriculture

It was held that a beef “checkoff”—an assessment on all sales and importation of cattle which, under a federal policy established by the federal Beef Promotion and Research Act of 1985, funded beef promotional campaigns that were approved by federal agencies—(1) funded the government’s own speech, and (2) was thus not susceptible to a compelled-subsidy challenge under the free-speech provisions of the Federal Constitution’s First Amendment. [Johanns v Livestock Mktg. Ass’n (2005, US) 161 L Ed 2d 896, 125 S Ct 2055.]

### § 5. Aliens

An alien’s conviction, under a Florida statute, for driving while under the influence of alcohol—which statute did not require proof of any particular mental state—was held not to be a valid basis for deportation

under 8 USCS § 1227(a), because the offense was not a “crime of violence” as defined in 8 USCS § 16. [Leocal v Ashcroft (2005, US) 160 L Ed 2d 271, 125 S Ct 377.]

Although an alien who was to be removed to his native Somalia argued that Somalia had no functioning government and thus could not consent in advance to his removal, the Supreme Court held that aliens may properly be removed, under 8 USCS § 1231(b)(2)(E)(iv), from the United States to the country of their birth without explicit advance consent of that country’s government. [Jama v Immigration & Customs Enforcement (2005, US) 160 L Ed 2d 708, 125 S Ct 694.]

It was held that Zadvydas v Davis (2001) 533 US 678, 150 L Ed 2d 653, 121 S Ct 2491—which had established a rule that under 8 USCS § 1231(a)(6), the United States Attorney General (later succeeded for this purpose by the Secretary of Homeland Security) was authorized to detain an alien, who had been admitted to the United States but subsequently ordered removed, after the initial 90-day statutory removal period (in 8 USCS § 1231(a)(1)(A)), only for so long as was reasonably necessary to secure the alien’s removal—applied to the detention of an alien who had not been lawfully admitted to the United States. [Clark v Martinez (2005, US) 160 L Ed 2d 734, 125 S Ct 716.]

## § 6. Appeal

With respect to a Federal Court of Appeals’ issuance of an amended opinion that changed a federal habeas corpus result from being against, to being in favor of, a Tennessee prisoner who had been convicted of first-degree murder and had been sentenced to death, it was held that even if, in some instances under Rule 41 of the Federal Rules of Appellate Procedure, a Court of

Appeals may properly withhold its mandate after the Supreme Court has denied certiorari, the Court of Appeals in the case at hand had abused its discretion by withholding its mandate (following the Court of Appeals' initial opinion against the prisoner) without a formal order for more than 5 months after the Supreme Court had denied the prisoner's petition for certiorari and petition for rehearing. [Bell v Thompson (2005, US) 162 L Ed 2d 693, 125 S Ct 2825.]

### § 7. Arrest

The Supreme Court held that for purposes of determining whether a warrantless arrest is lawful under the Federal Constitution's Fourth Amendment, the criminal offense for which there is probable cause to arrest does not have to be "closely related" to the offense stated by the arresting officer at the time of arrest. [Devenpeck v Alford (2004, US) 160 L Ed 2d 537, 125 S Ct 588.]

### § 8. Attorneys

The Supreme Court held that two attorneys did not have third-party standing to invoke the rights of hypothetical indigent clients to challenge Michigan's system for appointing appellate counsel for indigent defendants pleading guilty, where the attorneys did not have a close relationship with any person who possessed the right to challenge the system, as the attorneys had relied merely on a future attorney-client relationship with as-yet-unascertained criminal defendants. [Kowalski v Tesmer (2004, US) 160 L Ed 2d 519, 125 S Ct 564.]

However, the Supreme Court subsequently held that the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment required the appointment of counsel for indigent Michigan criminal defendants who (1) had been convicted

on pleas of guilty or nolo contendere, and (2) sought access to first-tier review in the Michigan Court of Appeals. [Halbert v Michigan (2005, US) 162 L Ed 2d 552, 125 S Ct 2582.]

With respect to an accused's capital murder trial in Florida, it was held that a public defender's strategic decision, made without the accused's express consent—to concede, at the guilt phase of the trial, the accused's commission of murder, and to concentrate the defense on establishing, at the penalty phase, cause for sparing the accused's life—did not automatically rank as prejudicial ineffective assistance of counsel that would have necessitated a new trial. [Florida v Nixon (2004, US) 160 L Ed 2d 565, 125 S Ct 551.]

In a case involving a Pennsylvania prisoner who had been found guilty of murder and who had been sentenced to death, it was held that for purposes of applying the standard of reasonable competence that was required of defense counsel under the Federal Constitution's Sixth Amendment, even when a capital defendant and the defendant's family members have suggested that no mitigating evidence is available, the defendant's counsel is required to make reasonable efforts to obtain and review evidence that counsel knows the prosecution will probably rely upon as aggravating evidence at the sentencing phase of trial. [Rompilla v Beard (2005, US) 162 L Ed 2d 360, 125 S Ct 2456.]

## § 9. Bankruptcy

The Supreme Court held that with respect to a joint bankruptcy petition, two debtors could properly exempt assets in the debtors' Individual Retirement Accounts (IRAs)—established under provisions including 26 USCS § 408—from the bankruptcy estate, pursuant to a provision of the Bankruptcy Code (11 USCS

§ 522(d)(10)(e)), as (1) payments from IRAs were on account of age, and (2) IRAs were similar plans to stock bonus, pension, profitsharing, or annuity plans. [Roussey v Jacoway (2005, US) 161 L Ed 2d 563, 125 S Ct 1561.]

### § 10. Copyright

In a case involving some distributors of free software products which allowed computer users to share, directly with each other, electronic files through “peer-to-peer” networks, the Supreme Court held that under the Copyright Act (17 USCS §§ 501 et seq.), one who distributes a product capable of both lawful and unlawful use, with the object of promoting the product’s use to infringe copyright (as shown by clear expression or other affirmative steps to promote infringement), is subject to liability for the resulting acts of infringement by third parties. [MGM Studios Inc. v Grokster, Ltd. (2005, US) 162 L Ed 2d 781, 125 S Ct 2764.]

### § 11. Defamation

With respect to a permanent injunction issued by a California state trial court—which had found in favor of an attorney in his defamation action brought against an individual—prohibiting the individual and others from picketing, from displaying signs, placards or other written or printed material, and from orally uttering statements about the attorney or his law firm in any public forum, the Supreme Court held that the case had not been mooted by the attorney’s death, of which the Supreme Court had been informed after an appeal by two of the parties against whom the injunction had been issued was orally argued before the Supreme Court, where the attorney’s widow was subsequently substituted for him as a party in the case. [Tory v Cochran (2005, US) 161 L Ed 2d 1042, 125 S Ct 2108.]

## § 12. Disabilities discrimination

By a majority opinion only in part, the Supreme Court held that (1) a Federal Court of Appeals had erred in ruling broadly that Title III of Americans with Disabilities Act of 1990 (42 USCS §§ 12181 et seq.), concerning public accommodations, was inapplicable to foreign-flag cruise ships operating in United States waters; but (2) a removal of barriers on a vessel would not be “readily achievable” for purposes of Title III if such removal would (a) bring the vessel into noncompliance with the International Convention for the Safety of Life at Sea (32 UST 47, TIAS No. 9700) or with any other international legal obligation, or (b) pose a direct threat to the health or safety of others. [Spector v Norwegian Cruise Line Ltd. (2005, US) 162 L Ed 2d 97, 125 S Ct 2169.]

## § 13. Double jeopardy

With respect to an accused’s conviction by a jury on a Massachusetts firearm charge, after the trial judge had purported to reverse an initial ruling, at the conclusion of the prosecution’s case, in favor of the accused on a motion for a required finding of not guilty, the Supreme Court held that (1) the trial judge’s initial ruling amounted to a judgment of acquittal for purposes of the double jeopardy clause of the Federal Constitution’s Fifth Amendment; and (2) the double jeopardy clause did not permit the judge to reconsider the ruling once the accused and his codefendant had rested their cases. [Smith v Massachusetts (2005, US) 160 L Ed 2d 914, 125 S Ct 1129.]

## § 14. Elections

The Supreme Court held that Oklahoma’s semi-closed primary system, in which a political party was allowed to invite only its own party members and voters

registered as Independents to vote in the party's primary elections, did not violate the freedom-of-association rights, under the Federal Constitution's First Amendment, of a particular party—which had sought to open its upcoming primary to all registered Oklahoma voters—or of several individual voters. [Clingman v Beaver (2005, US) 161 L Ed 2d 920, 125 S Ct 2029.]

### **§ 15. Environmental law**

A private party which—although potentially liable for cleaning up property contaminated by hazardous substances—had not been sued under § 106 or § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was held to be unable to obtain contribution under § 113(f)(1) of CERCLA from another allegedly liable party. [Cooper Indus. v Aviall Servs. (2004, US) 160 L Ed 2d 548, 125 S Ct 577.]

### **§ 16. Espionage compensation**

With respect to a couple's suit against defendants including the United States, it was held that the couple's due process and estoppel claims—based on the alleged failure of the United States Central Intelligence Agency (CIA) to provide the couple with financial assistance that the CIA had allegedly promised in exchange for the couple's asserted espionage services—had to be dismissed under the rule of *Totten v United States* (1876) 92 US 105, 23 L Ed 605, in which the Supreme Court had held that public policy prohibited an alleged spy during the American Civil War from suing the United States to enforce the latter's alleged obligations under a secret espionage agreement. [Tenet v Doe (2005, US) 161 L Ed 2d 82, 125 S Ct 1230.]

## § 17. False Claims Act

In a case involving an employee of a county conservation district who claimed that the district had retaliated against her for aiding federal officials in their investigation of the district's alleged false claims for payment, the Supreme Court held that (1) the 6-year limitations period in a False Claims Act (FCA) provision (31 USCS § 3731(b)(1)) did not govern civil FCA actions, under 31 USCS § 3730(h), for retaliation; and (2) instead, the most closely analogous state limitations period applied. [Graham County Soil & Water Conservation Dist. v United States ex rel. Wilson (2005, US) 162 L Ed 2d 390, 125 S Ct 2444.]

## § 18. Federal court jurisdiction

The Supreme Court held that the Rooker-Feldman doctrine—providing that Federal District Courts, given that they have original but not appellate jurisdiction, lack jurisdiction over suits seeking reversal or modification of state-court judgments—is confined to cases that (1) are brought in a District Court by state-court losers complaining of injuries caused by state-court judgments rendered before the District Court proceedings, and (2) invite District Court review and rejection of those judgments. [Exxon Mobil Corp. v Saudi Basic Indus. Corp. (2005, US) 161 L Ed 2d 454, 125 S Ct 1517.]

With respect to the removal, by a company which had obtained some real property at a federal tax sale, of a quiet-title action from state court to federal court, it was held that the national interest in providing a federal forum for federal tax litigation was sufficiently substantial to support the exercise of federal-question jurisdiction over a disputed issue on removal, where a second company, which had previously owned the property and which had brought the quiet-title action in state

court, had alleged that the Internal Revenue Service (IRS) had violated a notice provision in 26 USCS § 6335(a) when the IRS had seized the property from the second company in order to satisfy an asserted tax delinquency. [Grable & Sons Metal Prods. v Darue Eng'g & Mfg. (2005, US) 162 L Ed 2d 257, 125 S Ct 2363.]

It was held that an exception would not be grafted onto 28 USCS § 1738—which generally required federal courts to give full faith and credit to state judicial proceedings—in order to provide a federal-court forum for litigants seeking to advance a takings claim, under the Federal Constitution's Fifth Amendment, concerning a San Francisco ordinance's fee for converting residential hotel rooms to tourist rooms, even though the claimants assertedly had undertaken the state-court proceedings in question so as to ripen the federal takings claim. [San Remo Hotel, L.P. v City & County of San Francisco (2005, US) 162 L Ed 2d 315, 125 S Ct 2491.]

In a diversity-of-citizenship action where the elements of federal court jurisdiction were otherwise present, and where at least one named plaintiff satisfied the amount-in-controversy requirement for diversity jurisdiction, the Supreme Court held that 28 USCS § 1367 authorized a federal court to exercise supplemental jurisdiction over the claims of other plaintiffs in the same case or controversy (within the meaning of Article III of the Federal Constitution), even if those claims were for less than the jurisdictional amount specified in a diversity-jurisdiction statute (28 USCS § 1332). [Exxon Mobil Corp. v Allapattah Servs. (2005, US) 162 L Ed 2d 502, 125 S Ct 2611.]

### § 19. Federal habeas corpus—generally

With respect to an accused who, in a Tennessee trial, had been convicted of murder and had been sentenced to death, it was held that a Federal Court of Appeals—in granting federal habeas corpus relief to the accused on the ground that the state’s “especially heinous, atrocious, or cruel” aggravating circumstance, which had been found by the jury at the sentencing phase, supposedly was unconstitutionally vague—had failed to accord the deference required, under 28 USCS § 2254(d), to a prior Tennessee Supreme Court decision which, in affirming the accused’s conviction and sentence on direct appeal, had found that this aggravating circumstance had been shown by the evidence. [Bell v Cone (2005, US) 160 L Ed 2d 881, 125 S Ct 847.]

The Supreme Court held that a Federal Court of Appeals’ habeas corpus decision in favor of an accused, who had been convicted in a California state court on charges including first-degree murder and who had been sentenced to death, was contrary to the limits imposed on federal habeas corpus review by 28 USCS § 2254(d), where the California Supreme Court had previously rejected the accused’s claim that, in asserted violation of the Federal Constitution’s Eighth Amendment, the penalty-phase jury had been incorrectly led to believe that the jury could not consider the allegedly mitigating evidence of the accused’s postcrime conduct in determining whether he ought to receive life imprisonment or the death penalty. [Brown v Payton (2005, US) 161 L Ed 2d 334, 125 S Ct 1432.]

It was held—with respect to a state prisoner’s filing a “mixed” federal habeas corpus petition, containing some claims that have been exhausted in the state courts and some that have not—that in view of the changes made by the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA) to federal habeas corpus provisions such as 28 USCS §§ 2244 and 2254, (1) a Federal District Court has the discretion to use a “stay and abeyance” procedure, under which the District Court stays the mixed petition to allow the prisoner (a) to present the unexhausted claims to a state court in the first instance, and (b) then to return to federal court for review of the perfected petition; but (2) such a stay and abeyance should be available in only limited circumstances. [Rhines v Weber (2005, US) 161 L Ed 2d 440, 125 S Ct 1528.]

## § 20. —Limitations period

The Supreme Court held that a state prisoner’s postconviction petition that had been rejected by a state court as untimely would not be considered “properly filed” for purposes of an Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provision (28 USCS § 2244(d)(2)), which provided that the time within which a “properly filed” petition for state postconviction relief was pending would not be counted toward 28 USCS § 2244(d)’s general 1-year time limit on a state prisoner’s filing a federal habeas corpus petition. [Pace v DiGuglielmo (2005, US) 161 L Ed 2d 669, 125 S Ct 1807.]

It was held, with respect to a motion filed in a Federal District Court by a Florida prisoner—purportedly for relief, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, from a judgment dismissing his (first) federal habeas corpus petition—that (1) because this motion had sought only to challenge the District Court’s previous ruling on the limitations period of an AEDPA provision (28 USCS § 2244(d)), this motion was not the equivalent of a “successive” federal habeas corpus petition, for purposes of another AEDPA provision (28 USCS § 2244(b)); but (2) under the Rule

60(b) standards that properly governed the prisoner's motion, the District Court had been correct to deny the prisoner relief on this motion. [Gonzalez v Crosby (2005, US) 162 L Ed 2d 480, 125 S Ct 2641.]

The Supreme Court held that a state prisoner's amended federal habeas corpus petition does not relate back—and thereby escape the 1-year limitations period generally imposed by an AEDPA provision (28 USCS § 2244(d)(1))—when the amended petition asserts a new ground for relief supported by facts that differ in both time and type from those that the original pleading set forth. [Mayle v Felix (2005, US) 162 L Ed 2d 582, 125 S Ct 2562.]

## § 21. Federal postconviction relief

With respect to a prisoner's collateral attack on his federal sentence on the ground that a state conviction used to enhance this sentence had later been vacated, the Supreme Court held that the 1-year limitations period in a 28 USCS § 2255 provision on motions by prisoners seeking to modify their federal sentences—which provision referred to the date on which the facts supporting the claim could have been discovered through due diligence—began to run when the prisoner received notice of the order vacating the prior conviction, provided that the prisoner had sought the order with due diligence in state court, after entry of judgment in the federal case with the enhanced sentence. [Johnson v United States (2005, US) 161 L Ed 2d 542, 125 S Ct 1571.]

It was held that, for purposes of applying the general 1-year limitations period in 28 USCS § 2255 on filing for federal postconviction relief, the date from which the limitations period began to run under a portion of § 2255—which referred to the date on which the right asserted was “initially recognized” by the Supreme

Court, if that right had been “made retroactively applicable” to cases on collateral review—was (1) the date when the Supreme Court initially recognized the right asserted, rather than (2) the date on which the right was made retroactive. [Dodd v United States (2005, US) 162 L Ed 2d 343, 125 S Ct 2478.]

For federal habeas corpus cases, see §§ 19 and 20, *supra*.

## § 22. Firearms

The Supreme Court held that for the sentencing purpose of determining whether a federal criminal defendant’s prior guilty pleas to some Massachusetts burglary charges ought to have counted under 18 USCS § 924(e), which imposed a mandatory 15-year minimum sentence upon anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies—the latter including what the Supreme Court had construed as only “generic” burglary (committed in a building or confined space, not a boat or motor home)—the sentencing court (1) was not permitted to look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary; and (2) generally was limited to examining the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit finding by the trial judge to which the defendant assented. [Shepard v United States (2005, US) 161 L Ed 2d 205, 125 S Ct 1254.]

It was held that in 18 USCS § 922(g)(1)—which generally made it unlawful for a person, convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year, to possess a firearm—the phrase “convicted in any court” referred only to domestic

courts, not to foreign nations' courts. [Small v United States (2005, US) 161 L Ed 2d 651, 125 S Ct 1752.]

### **§ 23. Guilty plea**

With respect to an accused who had pleaded guilty to an Ohio aggravated-murder charge and had been sentenced to death, the Supreme Court held that (1) the accused's guilty plea was not invalid on the theory that he had not been aware of the specific-intent element of the aggravated-murder charge; (2) some alleged prosecutorial inconsistencies, between the accused's case and the case of an asserted accomplice, did not require voiding the accused's guilty plea; and (3) it was premature for the Supreme Court to decide whether the prosecution's use of allegedly inconsistent theories might have had a more direct effect on the accused's sentence, where a Federal Court of Appeals had not been given the opportunity to consider in the first instance the question of how the prosecutor's conduct related to the accused's sentence in particular. [Bradshaw v Stumpf (2005, US) 162 L Ed 2d 143, 125 S Ct 2398.]

### **§ 24. Income tax**

The Supreme Court held that as general rule for federal income tax purposes, when a litigant's recovery of a money judgment or settlement constituted gross income under § 61(a) of the Internal Revenue Code (26 USCS § 61(a)), the litigant's gross income would be deemed to include the portion of the recovery paid to the litigant's attorney as a contingent fee. [Comm'r v Banks (2005, US) 160 L Ed 2d 859, 125 S Ct 826.]

### **§ 25. Indians**

With respect to some contracts with tribes under the Indian Self-Determination and Assistance Act, as

amended (25 USCS §§ 450 et seq.)—which authorized the Federal Government and Indian tribes to enter into contracts in which the tribes promised to supply federally funded services, such as tribal health services, that a Federal Government agency would otherwise provide—it was held that the Federal Government's promises to pay certain “contract support costs,” which the tribes in question had incurred during fiscal years 1994 through 1997, were legally binding. [Cherokee Nation v Leavitt (2005, US) 161 L Ed 2d 66, 125 S Ct 1172.]

The Supreme Court held that—with respect to federal-court claims by the Oneida Indian Nation of New York (OIN) concerning some parcels of former Oneida reservation land, located within a city in New York state, that the OIN had purchased in 1997 and 1998—the OIN was not entitled to recognition of the OIN's existing and future sovereign authority to remove the land from local taxation. [City of Sherrill v Oneida Indian Nation (2005, US) 161 L Ed 2d 386, 125 S Ct 1478].

## § 26. International Court of Justice

The Supreme Court dismissed, as improvidently granted, a writ of certiorari to consider two questions—whether a federal court (1) was bound by the International Court of Justice's (IJC's) ruling that United States courts were required to consider the petitioner's claim for relief under the Vienna Convention on Consular Relations (TIAS No. 6820) without regard to procedural default doctrines; and (2) should give effect, as a matter of judicial comity and uniform treaty interpretation, to the IJC's judgment—as proceedings concerning the petitioner's state-court application for a writ of habeas corpus, relying in part in a memorandum issued by the President of the United

States after the Supreme Court had granted certiorari, might have provided the reconsideration of the petitioner's Vienna Convention claim that he was seeking from the Supreme Court. [Medellin v Dretke (2005, US) 161 L Ed 2d 982, 125 S Ct 2088.]

### **§ 27. Jury selection**

It was held that—in order to establish a *prima facie* case, under Batson v Kentucky (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, of discrimination in peremptory challenges of prospective jurors—an objector was not required to show that it was more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. [Johnson v California (2005, US) 162 L Ed 2d 129, 125 S Ct 2410.]

Also, the Supreme Court held that a Texas prisoner was entitled to prevail on his claim that prosecutors in his capital murder trial had made peremptory strikes of potential jurors on the basis of race, where, among other considerations, (1) the prosecutors had used their peremptory strikes to exclude 91 percent of the eligible black venire members; (2) evidence indicated that race had been significant in peremptory strikes of two particular black venire members; and (3) more broadly, the prosecution's shuffling of the venire panel, its inquiry into views on the death penalty, and its questioning about minimum acceptable sentences all indicated decisions that probably had been based on race. [Miller-El v Dretke (2005, US) 162 L Ed 2d 196, 125 S Ct 2317.]

### **§ 28. Lending**

It was held that the statutory damages limits (minimum \$100 to maximum \$1,000) in a Truth in Lending Act provision (15 USCS § 1640(a)) for violations involv-

ing personal-property loans had not been altered by a 1995 amendment increasing the § 1640(a) damages range for violations concerning loans secured by real property. [Koons Buick Pontiac GMC, Inc. v Nigh (2004, US) 160 L Ed 2d 389, 125 S Ct 460.]

### § 29. Marijuana

The court held that the categorical prohibition, under the Controlled Substances Act (21 USCS §§ 801 et seq.), of the manufacture and possession of marijuana, did not—as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to a California statute—exceed Congress’ authority under the Federal Constitution’s commerce clause (Art I, § 8, cl 3). [Gonzales v Raich (2005, US) 162 L Ed 2d 1, 125 S Ct 2195.]

### § 30. Maritime law

With respect to the delivery of 10 containers of machinery from Australia to Alabama in various stages by sea and land, it was held that a railroad that had been hired by a shipper to execute the land leg was protected, under federal maritime law, by liability limitations contained in bills of lading issued by (1) a freight forwarder to the cargo owner, and (2) the shipper to the freight forwarder. [Norfolk Southern Ry. v James N. Kirby, Pty Ltd. (2004, US) 160 L Ed 2d 283, 125 S Ct 385.]

In a case involving claims under a Jones Act provision (46 USCS Appx § 688(a)) and the Longshore and Harbor Workers’ Compensation Act (LHWCA) (33 USCS §§ 901 et seq.) by a worker who allegedly had been injured in Boston Harbor during a tunnel project, it was held that an allegedly-involved dredge was a “vessel” within the meaning of 33 USCS § 902(3)(G), excepting from the LHWCA’s coverage “a master or

member of a crew of any vessel," where the dredge had been used to transport equipment and workers over water. [Stewart v Dutra Constr. Co. (2005, US) 160 L Ed 2d 932, 125 S Ct 1118.]

### **§ 31. Money laundering**

The Supreme Court held that a federal criminal conviction for conspiracy to commit money laundering, in asserted violation of 18 USCS § 1956(h), did not require proof of an overt act in furtherance of the alleged conspiracy. [Whitfield v United States (2005, US) 160 L Ed 2d 611, 125 S Ct 687.]

### **§ 32. Patents**

It was held that uses of patented chemical compounds in preclinical research, the results of which are not ultimately included in a submission to the Food and Drug Administration (FDA), are exempted from infringement under a drug-research safe-harbor provision in 35 USCS § 271(e)(1), at least as long as there is a reasonable basis to believe that (1) the compound tested could be the subject of an FDA submission, and (2) the experiments in question will produce the types of information relevant to (a) an investigational new drug application, or (b) a new drug application. [Merck KGaA v Integra Lifesciences I, Ltd. (2005, US) 162 L Ed 2d 160, 125 S Ct 2372.]

### **§ 33. Pesticides**

With respect to some Texas peanut farmers' state-law claims of crop injury from a particular pesticide, the Supreme Court held that (1) the Federal Insecticide, Fungicide, and Rodenticide Act (7 USCS §§ 136 et seq.) pre-empted some state-law claims of injury from pesticides; (2) the farmers' claims of defective design, defective manufacture, negligent testing, and breach of

express warranty were not pre-empted; and (3) the case would be remanded for a determination whether the farmers' claims of fraud and negligent failure to warn were pre-empted. [Bates v Dow Agrosciences L.L.C. (2005, US) 161 L Ed 2d 687, 125 S Ct 1788.]

### § 34. Police officers

The Supreme Court held that a city's dismissal of a police officer—for offering for online sale items such as videos showing the officer stripping off a police uniform and engaging in sexual acts—did not violate the officer's free speech right under the Federal Constitution's First Amendment. [City of San Diego v Roe (2004, US) 160 L Ed 2d 410, 125 S Ct 521.]

In a case in which the Supreme Court described a police officer's alleged actions as falling "in the hazy border between excessive and acceptable force," it was held that the officer—who had allegedly shot an individual who had been attempting to flee from law-enforcement officers in a motor vehicle—was entitled to qualified immunity from the individual's civil rights claim under 42 USCS § 1983, as the cases decided as of the time in question had not clearly established that the officer's alleged conduct had violated the individual's rights under the Federal Constitution's Fourth Amendment. [Brosseau v Haugen (2004, US) 160 L Ed 2d 583, 125 S Ct 596.]

It was held that an individual, who allegedly had obtained a restraining order under Colorado law against her estranged husband, did not have a protected property interest—for purposes of the due process clause of the Federal Constitution's Fourteenth Amendment—in police enforcement of the restraining order, where the individual alleged, in a 42 USCS § 1983 civil rights action, that (1) police officers had failed to act on repeated reports that the husband had

taken his and the individual's children, and (2) the husband had ultimately murdered the children. [Town of Castle Rock v Gonzales (2005, US) 162 L Ed 2d 658, 125 S Ct 2796.]

### § 35. Prisoners

The Supreme Court, without deciding whether an unwritten policy of the California department of corrections violated the equal protection clause of the Federal Constitution's Fourteenth Amendment, held that strict scrutiny was the proper standard of review for an equal-protection challenge to this policy, where, under the policy, prisoners were racially segregated in double cells in reception centers for up to 60 days each time that the prisoners entered a new correctional facility. [Johnson v California (2005, US) 160 L Ed 2d 949, 125 S Ct 1141.]

It was held that two Ohio prisoners claiming that the state's parole procedures violated the Federal Constitution (1) could properly bring particular 42 USCS § 1983 actions seeking declaratory and injunctive relief; and (2) were not required to seek relief exclusively under the federal habeas corpus statutes (such as 28 USCS § 2254). [Wilkinson v Dotson (2005, US) 161 L Ed 2d 253, 125 S Ct 1242.]

Also, the court held that procedures which Ohio had adopted for the placement of prisoners at the state's highest-security prison—a "Supermax" facility with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population—provided sufficient protection to comply with the due process requirements of the Federal Constitution's Fourteenth Amendment. [Wilkinson v Austin (2005, US) 162 L Ed 2d 174, 125 S Ct 2384.]

See Cutter v Wilkinson (2005, US) 161 L Ed 2d 1020, 125 S Ct 2113, *infra* § 36—involving a claim by some

current and former Ohio prison inmates that prison officials had violated § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (42 USCS § 2000cc-1(a)(1)-(2)) by allegedly failing to accommodate the inmates' religious exercise—where the court held that § 3 did not, on its face, violate the establishment of religion clause of the Federal Constitution's First Amendment.

### § 36. Religion

It was held, by a majority result without a majority opinion, that the display of a 6-foot-high monolith inscribed with the Ten Commandments—among 21 historical markers and 17 monuments on the grounds surrounding the Texas state capitol—did not violate the Federal Constitution's First Amendment clause prohibiting an establishment of religion. [Van Orden v Perry (2005, US) 162 L Ed 2d 607, 125 S Ct 2854.]

However, a majority of the Justices held that two Kentucky counties' displays, in the counties' courthouses, of the Ten Commandments violated the establishment of religion clause, where (1) the original displays had been modified to include other historical documents, but (2) the court found that no legitimizing secular legislative purpose had been shown even for the modified displays. [McCreary County v ACLU (2005, US) 162 L Ed 2d 729, 125 S Ct 2722.]

The court held that § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (42 USCS § 2000cc-1(a)(1)-(2))—which provides that no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution unless the burden furthers a compelling governmental interest and does so by the least restrictive means—does not, on its face, violate the establish-

ment of religion clause. [Cutter v Wilkinson (2005, US) 161 L Ed 2d 1020, 125 S Ct 2113.]

### § 37. Searches and seizures

The Supreme Court held that a state trooper's "dog sniff"—in which the trooper walked a narcotics-detection dog around the exterior of a driver's car while the driver was seized by another trooper for a traffic violation—did not violate the Federal Constitution's Fourth Amendment, for (1) the initial seizure by the first trooper had been based on probable cause and was concededly lawful; (2) the duration of the 10-minute stop was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop; and (3) any intrusion on the driver's privacy expectations did not rise to the level of a constitutionally cognizable infringement. [Illinois v Caballes (2005, US) 160 L Ed 2d 842, 125 S Ct 834.]

It was held that—under the circumstances presented concerning an individual's 42 USCS § 1983 claims against some police officers who had been the lead members of a police detachment executing a search of the premises that the individual and some others had occupied—the Fourth Amendment had not been violated by (1) the individual's detention in handcuffs for the length of the search; or (2) the officers' questioning of the individual, during this detention, about the individual's immigration status. [Muehler v Mena (2005, US) 161 L Ed 2d 299, 125 S Ct 1465.]

See Brosseau v Haugen (2004, US) 160 L Ed 2d 583, 125 S Ct 596, *supra* § 34, where the Supreme Court held that a police officer, who had allegedly shot an individual who had been attempting to flee from law-enforcement officers in a motor vehicle, was entitled to qualified immunity from the individual's civil rights claim under 42 USCS § 1983, as the cases de-

cided as of the time in question had not clearly established that the officer's alleged conduct had violated the individual's rights under the Fourth Amendment.

### § 38. Securities

With respect to a private securities-fraud class action purportedly under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j(b)) and Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5), the Supreme Court held that for purposes of the 15 USCS § 78u-4(b)(4) requirement that a private plaintiff who claims securities fraud must demonstrate economic loss, such a plaintiff cannot satisfy this loss-causation requirement simply by alleging in the complaint, and subsequently establishing, that the price of a security on the date of purchase was inflated because of a misrepresentation. [Dura Pharms., Inc. v Broudo (2005, US) 161 L Ed 2d 577, 125 S Ct 1627.]

### § 39. Sentencing

In one of the 2004-2005 Term's leading decisions, it was held that (1) the right to a trial by jury under the Federal Constitution's Sixth Amendment applied to the Federal Sentencing Guidelines (18 USCS Appx); (2) two of the Federal Sentencing Act's provisions—18 USCS § 3553(b)(1), which made the Guidelines mandatory on judges, and 18 USCS § 3742(e), which depended on the Guidelines' mandatory nature—violated the Sixth Amendment; (3) with these provisions severed, the Act made the Guidelines effectively advisory; and (4) the Supreme Court's holdings in the two consolidated cases at hand concerning the Guidelines had to be applied to all cases, including the cases at hand, currently pending on direct review. [United States v Booker (2005, US) 160 L Ed 2d 621, 125 S Ct 738.]

In another leading case—arising with respect to a Missouri defendant who had been convicted and sentenced to death for a murder assertedly committed when he had been 17 years old—the Supreme Court held that the Federal Constitution’s Eighth Amendment prohibition against cruel and unusual punishments barred the imposition of the death penalty on offenders who were under 18 when their crimes were committed. [Roper v Simmons (2005, US) 161 L Ed 2d 1, 125 S Ct 1183.]

It was held that a Texas court’s “nullification instruction,” directing a capital-sentencing jury to give effect to mitigating evidence only if the jury answered “no” to at least one of two questions relating to the crime’s deliberateness and the defendant’s future dangerousness, was inadequate under the Federal Constitution’s Eighth Amendment. [Smith v Texas (2004, US) 160 L Ed 2d 303, 125 S Ct 400.]

The Supreme Court held that (1) the due process provisions of the Federal Constitution’s Fifth and Fourteenth Amendments prohibited, during the penalty phase of a capital trial, use on an accused of shackles that were visible to the jury, unless such use was justified by an essential state interest; and (2) these constitutional requirements had not been shown to have been met with respect to an accused who had been shackled during a Missouri state court’s sentencing proceeding. [Deck v Missouri (2005, US) 161 L Ed 2d 953, 125 S Ct 2007.]

For a case involving the assistance of counsel at a sentencing procedure, see § 8, supra.

Also, for cases involving federal habeas corpus relief with respect to state sentences, see §§ 19 and 20, supra, and for cases involving other federal postconviction review with respect to federal sentences, see § 21, supra.

### § 40. Sex discrimination

In a case involving a claim that a board of education had removed a coach for complaining about sex discrimination against his girls' high school basketball team, the Supreme Court held that the implied private right of action for violations of Title IX of the Education Amendments of 1972 (20 USCS §§ 1681 et seq.)—which, in 20 USCS § 1681(a), prohibited discrimination “on the basis of sex” in education programs or activities receiving federal funding—encompassed claims alleging that a funding recipient had retaliated against an individual because the individual had complained about sex discrimination. [Jackson v Birmingham Bd. of Educ. (2005, US) 161 L Ed 2d 361, 125 S Ct 1497.]

### § 41. Taking of property

The Supreme Court held that (1) a Connecticut city's proposed disposition of some real property qualified as a “public use” within the meaning of the takings clause of the Federal Constitution's Fifth Amendment; and (2) thus, the city's development agent was permitted to use the power of eminent domain to acquire this property from unwilling owners while assembling the land needed for a development project that had been projected to create jobs, to increase tax and other revenues, and to revitalize the economically distressed city. [Kelo v City of New London (2005, US) 162 L Ed 2d 439, 125 S Ct 2655.]

The court held that a formula that had been announced in *Agins v Tiburon* (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138—that the application of a general zoning law to particular property effects a taking of property without just compensation, in violation of the Federal Constitution's Fifth Amendment, if the law “does not substantially advance legitimate state

interests”—was not an appropriate test for determining whether a regulation of private property effects a Fifth Amendment taking. [Lingle v Chevron U.S.A., Inc. (2005, US) 161 L Ed 2d 876, 125 S Ct 2074.]

For a case involving procedural questions with respect to a Fifth Amendment takings claim, see § 18, supra.

## § 42. Tax Court

The Supreme Court held that the United States Tax Court could not properly exclude from the record on later appeal a report submitted, under Rule 183 of the Tax Court Rules, by a special trial judge for review by a Tax Court judge, as the Tax Court Rules did not authorize such an exclusion practice. [Ballard v Comm'r (2005, US) 161 L Ed 2d 227, 125 S Ct 1270.]

## § 43. Telecommunications

In a case involving a homeowner who had sued a city for denying him permission to construct a radio tower on his property, it was held that an individual could not properly enforce, through an action under 42 USCS § 1983, the limitations on local zoning authority, concerning wireless-communications facilities, that were set forth in a Telecommunications Act of 1996 provision (47 USCS § 332(c)(7)). [City of Rancho Palos Verdes v Abrams (2005, US) 161 L Ed 2d 316, 125 S Ct 1453.]

With respect to the Communications Act of 1934, which—as amended by provisions including the Telecommunications Act of 1996 (47 USCS §§ 151 et seq.)—subjected all providers of “telecommunications servic[e]” to mandatory common-carrier regulation, the Supreme Court held that the Federal Communications Commission had properly concluded that cable companies which sold broadband Internet service (1)

did not provide “telecommunications servic[e]” as the Communications Act defined the term; and (2) thus, were exempt from such mandatory regulation. [Nat'l Cable & Telecomms. Ass'n v Brand X Internet Servs. (2005, US) 162 L Ed 2d 820, 125 S Ct 2688.]

#### **§ 44. Trademarks**

The Supreme Court held that a party raising the affirmative defense of “fair use” to a claim of trademark infringement, pursuant to a Lanham Act provision (15 USCS § 1115(b)(4)), did not have a burden to negate any likelihood that the practice complained of would confuse consumers about the origin of the goods or services affected. [KP Permanent Make-Up, Inc. v Lasting Impression I, Inc. (2004, US) 160 L Ed 2d 440, 125 S Ct 542.]

#### **§ 45. Trucks**

The court held that a \$100 annual fee, which the state of Michigan charged trucks engaging in intrastate commercial hauling, did not violate the Federal Constitution's commerce clause (Art I, § 8, cl 3). [Am. Trucking Ass'ns v Mich. PSC (2005, US) 162 L Ed 2d 407, 125 S Ct 2419.]

In addition, it was held that a \$100 annual fee, which Michigan imposed on each license-plated truck operating solely in interstate commerce, was not pre-empted by 49 USCS § 14504(b), which prohibited a “State registration requirement” imposing an unreasonable burden. [Mid-Con Freight Sys. v Mich. PSC (2005, US) 162 L Ed 2d 418, 125 S Ct 2427.]

#### **§ 46. Waters and submerged lands**

In an original action initially brought in the Supreme Court by Kansas against Colorado for allegedly violating the Arkansas River Compact (63 Stat 145)—an

agreement between the two states that was intended to divide the Arkansas River's upper waters—the court made various rulings, among them that in awarding money to Kansas, in view of a 2001 decision by the court (533 US 1, 150 L Ed 2d 72, 121 S Ct 2023), prejudgment interest was to be calculated only from 1985 onward and on (post-1985) late damages alone, so as to exempt completely any earlier damages from prejudgment interest. [Kansas v Colorado (2004, US) 160 L Ed 2d 418, 125 S Ct 526.]

In an original proceeding which had been initiated by the state of Alaska to resolve its dispute with the United States concerning the title to certain submerged lands underlying waters located in southeast Alaska, the Supreme Court overruled Alaska's exceptions to a Special Master's report which had recommended a grant of summary judgment to the United States with respect to all the submerged lands in dispute. [Alaska v United States (2005, US) 162 L Ed 2d 57, 125 S Ct 2137.]

It was held that Congress, in enacting a Reclamation Reform Act of 1982 provision (43 USCS § 390uu), had not consented to a breach-of-contract suit against the United States that had been filed, in a Federal District Court, by some individual farmers and farming entities in California who purchased water from a water district, where (1) this district received its water from the United States Bureau of Reclamation under a contract between these two organizations; and (2) the farmers and farming entities contended that the Bureau had breached the contract by reducing the water supply to the district. [Orff v United States (2005, US) 162 L Ed 2d 544, 125 S Ct 2606.]

### § 47. Wine sales

In consolidated cases arising in Michigan and New York, it was held that (1) state laws whose object and effect were to allow in-state wineries to sell wine directly to consumers in the state but to prohibit out-of-state wineries from doing so—or, at the least, to make direct sales impractical from an economic standpoint—discriminated against interstate commerce in violation of the Federal Constitution's commerce clause (Art I, § 8, cl 3); and (2) this discrimination was neither authorized nor permitted by § 2 of the Constitution's Twenty-First Amendment, which prohibited the importation of intoxicating liquors into a state in violation of “the laws thereof.” [Granholm v Heald (2005, US) 161 L Ed 2d 796, 125 S Ct 1885.]

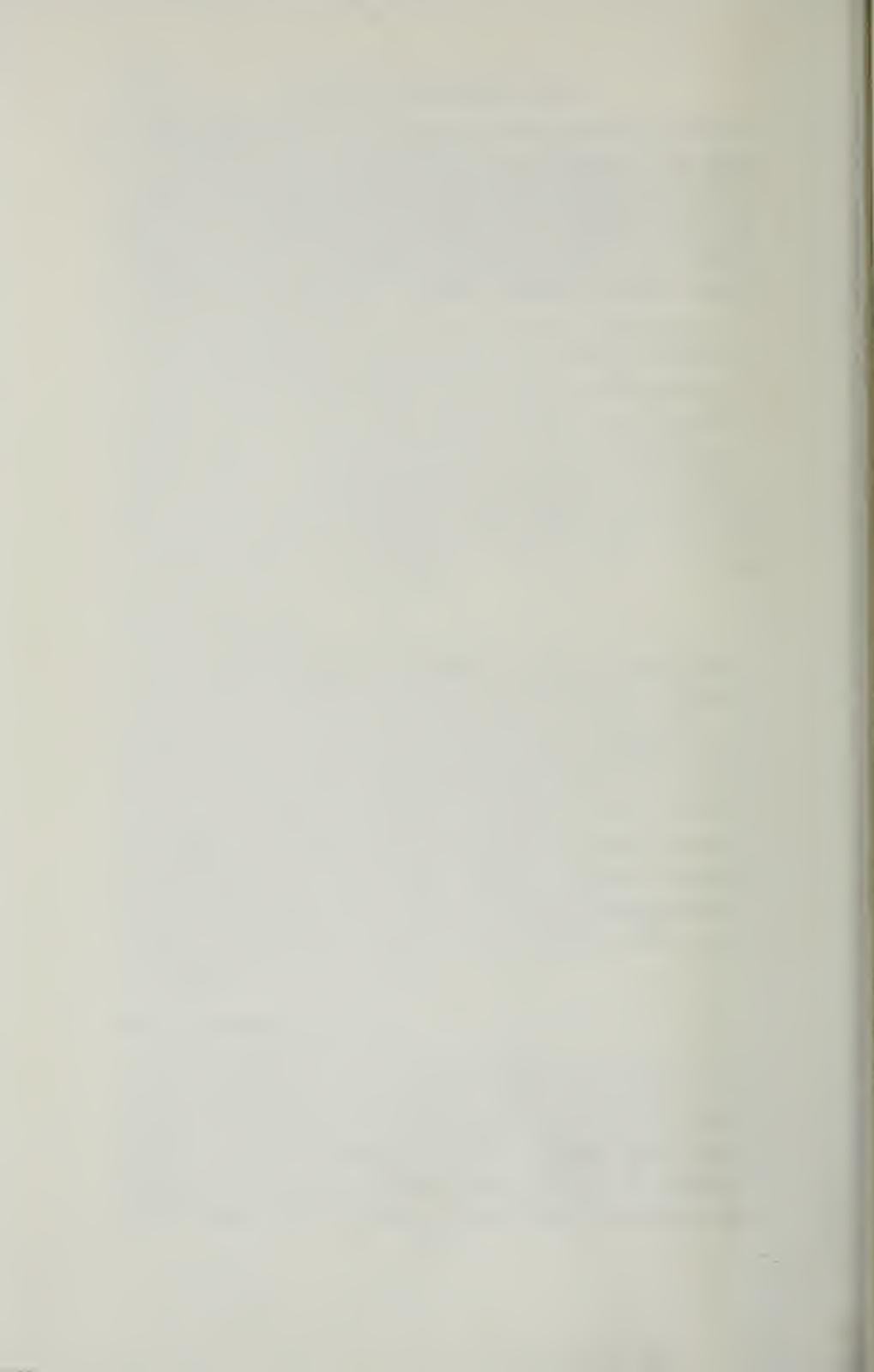
### § 48. Wire fraud

In a case involving defendants who had been convicted of federal wire fraud, under 18 USCS § 1343, for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States while avoiding Canadian excise taxes, the Supreme Court held that a plot to defraud a foreign government of tax revenues (1) violated § 1343; and (2) did not derogate from the common-law revenue rule, which generally barred courts from enforcing the tax laws of foreign sovereigns. [Pasquantino v United States (2005, US) 161 L Ed 2d 619, 125 S Ct 1766.]

### § 49. Witness tampering

With respect to witness-tampering provisions (18 USCS §§ 1512(b)(2)(A) and (B))—which made it a crime to knowingly corruptly persuade another person with intent to cause that person to withhold documents from, or alter documents for use in, an official proceeding—the Supreme Court held that a jury in-

struction, to the effect that the jury was not required to find any consciousness of wrongdoing in order to convict an accounting firm, had failed to convey properly the elements of a corrupt-persuasion conviction under § 1512(b). [Arthur Andersen LLP v United States (2005, US) 161 L Ed 2d 1008, 125 S Ct 2129.]



## **SUMMARIES OF DECISIONS**

**JOSUE LEOCAL**, Petitioner

v

**JOHN D. ASHCROFT, ATTORNEY GENERAL, et al.**

543 US —, 160 L Ed 2d 271, 125 S Ct 377

[No. 03-583]

Argued October 12, 2004.

Decided November 9, 2004.

**Decision:** Alien's conviction of Florida driving-while-under-influence-of-alcohol offense not requiring proof of any mental state held not to be crime of violence, under 8 USCS § 16, authorizing deportation pursuant to 8 USCS § 1227(a).

## **SUMMARY**

While an alien—a Haitian citizen who was a lawful permanent resident of the United States—was serving a 2<sup>1</sup>/<sub>2</sub>-year prison sentence for driving under the influence of alcohol (DUI) and causing serious bodily harm, in violation of a Florida statute that required no proof of any mental state for conviction, the United States Immigration and Naturalization Service (INS) initiated removal proceedings against the alien pursuant to § 237(a) of the Immigration and Nationality Act (INA) (8 USCS § 1227(a)), which, in 8 USCS § 1227(a)(2)(A)(iii), permitted deportation, upon an order of the United States Attorney General, of any alien who had been convicted of an “aggravated

felony," which was defined in INA § 101(a)(43)(F) (8 USCS § 1101(a)(43)(F)) to include "a crime of violence" (as defined in 18 USCS § 16) for which the term of imprisonment was at least 1 year.

Moreover, "crime of violence" was defined in 18 USCS § 16 as "an offense that has as an element the use . . . of physical force against the person or property of another," (18 USCS § 16(a)), or (2) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (18 USCS § 16(b)).

An Immigration Judge found the alien removable, and the Board of Immigration Appeals (BIA) affirmed the Immigration Judge's decision. After the alien had completed his sentence and had been deported to Haiti, the United States Court of Appeals for the Eleventh Circuit dismissed the alien's petition for review.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by REHNQUIST, Ch. J., expressing the unanimous view of the court, it was held that the alien's DUI conviction was not a valid basis for deportation under 8 USCS § 1227(a), because his conviction was not a crime of violence under (1) 18 USCS § 16(a), as the phrase in that subsection referring to the use of physical force against the person or property of another most naturally suggested a higher degree of intent than merely negligent or accidental conduct; or (2) 18 USCS § 16(b), as § 16(b) did not cover the negligent operation of a motor vehicle.

**COUNSEL**

Joseph S. Sollers, III argued the cause for petitioner.  
Dan Himmelfarb argued the cause for respondents.

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NORFOLK SOUTHERN RAILWAY COMPANY, Petitioner

v

JAMES N. KIRBY, PTY LTD., dba KIRBY ENGINEERING, and ALLIANZ AUSTRALIA INSURANCE LIMITED

543 US —, 160 L Ed 2d 283, 125 S Ct 385

[No. 02-1028]

Argued October 6, 2004.

Decided November 9, 2004.

**Decision:** Railroad that was subcontractor of shipper held to be protected, under federal maritime law, by liability limitations contained in bills of lading issued by (1) freight forwarder to cargo owner, and (2) shipper to freight forwarder.

## SUMMARY

A manufacturer hired a freight forwarder to arrange for the delivery of 10 containers of machinery from Australia to Alabama. The freight forwarder's bill of lading (1) provided for (a) a sea leg of the journey in question with Savannah, Georgia, as the discharge port, and (b) a land leg with Huntsville, Alabama—some 366 miles inland from Savannah—as the ultimate destination; (2) set the freight forwarder's liability limitation lower than the cargo's true value; (3) used a default liability rule of \$500 per package—as provided in a provision of the Carriage of Goods by Sea Act (COGSA) (46 USCS Appx § 1304(5))—for the sea leg and a higher amount for the land leg; and (4) contained a "Himalaya clause," which extended the liability limita-

tions to “any servant, agent or other person (including any independent contractor)” whose services would be used in order to perform the contract. The manufacturer also separately insured the cargo for its true value with an insurance company.

The freight forwarder hired a shipper to transport the containers. The shipper’s bill of lading (1) adopted COGSA’s default rule in limiting the shipper’s liability, (2) extended that liability limitation to the land leg, and (3) contained a Himalaya clause extending the liability limitation to the shipper’s agents and independent contractors.

The shipper hired a railroad to execute the land leg. The railroad’s train derailed, and \$1.5 million in damages was allegedly incurred. The insurance company reimbursed the manufacturer for the loss and then joined the manufacturer in (1) suing the railroad in the United States District Court for the Northern District of Georgia, (2) asserting diversity jurisdiction, and (3) alleging tort and contract claims. The District Court, in granting the railroad partial summary judgment, (1) limited the railroad’s liability to \$500 per container, and (2) certified the decision for interlocutory review.

The United States Court of Appeals for the Eleventh Circuit, in reversing, concluded that (1) the railroad could not claim protection under the first bill of lading’s Himalaya clause, for (a) the railroad had not been in privity with the freight forwarder when that bill was issued, and (b) linguistic specificity was required to extend the clause’s benefits to an inland carrier; and (2) the manufacturer was not bound by the second bill of lading’s liability limitation, for the freight forwarder was not acting as the manufacturer’s agent when the freight forwarder received that bill from the shipper (300 F3d 1300, reh in banc den 52 Fed Appx 489, 2002 US App LEXIS 26161).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by O'CONNOR, J., expressing the unanimous view of the court, it was held that:

- (1) The case was governed by federal law rather than state law, because (a) the two bills of lading were maritime contracts, and (b) the dispute involving the land leg of the journey was not an inherently local case.
- (2) The freight forwarder's liability limitation, contained in the first bill of lading, extended to protect the railroad, for (a) the manufacturer and the freight forwarder must have anticipated that a land carrier's services would be necessary for the contract's performance; and (b) a railroad such as the one in question was clearly an intended beneficiary of the clause that extended the liability limitation broadly to "any independent contractor."
- (3) The shipper's liability limitation, contained in the second bill of lading, extended to protect the railroad, for (a) although the traditional indicia of agency did not exist between the manufacturer and the freight forwarder, a holding that the railroad was entitled to the protection of the liability limitation required that the freight forwarder be treated as the manufacturer's agent not in the classic sense, but only for the single and limited purpose of contracting with subsequent carriers for limitation on liability; and (b) such a holding produced an equitable result, as the manufacturer retained the option to sue the freight forwarder for any loss that exceeded the liability limitation.

**COUNSEL**

Carter G. Phillips argued the cause for petitioner.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

David C. Frederick argued the cause for respondents.

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LaROYCE LATHAIR SMITH, Petitioner

v

TEXAS

543 US —, 160 L Ed 2d 303, 125 S Ct 400

[No. 04-5323]

Decided November 15, 2004.

**Decision:** “Nullification instruction,” directing capital sentencing jury to give effect to mitigating evidence only if jury answered “no” to at least one of two questions relating to deliberateness and future dangerousness, held to be inadequate under Federal Constitution’s Eighth Amendment.

## SUMMARY

During the sentencing phase of an accused’s capital murder trial, the trial judge issued to the jury a supplemental “nullification instruction” directing the jury to give effect to mitigating evidence only if the jury answered “no” to at least one of the following two questions concerning special issues: “(1) Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result? (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?”

The accused presented to the jury mitigating evidence that (1) he had been diagnosed with potentially organic learning disabilities and speech handicaps at an early age; (2) he had a verbal IQ score of 75 and a full IQ of 78 and, as a result, had been in special

education classes throughout most of his time in school; (3) despite his low IQ and learning disabilities, his behavior at school had often been exemplary; (4) his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support the drug addiction; and (5) he was only 19 years old when he committed the crime. The prosecution submitted evidence that the accused had acted deliberately and evidence indicating future danger.

The jury verdict form, which mentioned neither nullification nor mitigating evidence, asked two questions—whether (1) the accused had committed the murder deliberately, and (2) there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society—to which the jury was allowed to give only “yes” or “no” answers. The jury answered both questions “yes” and sentenced the accused to death.

On direct appeal, the Texas Court of Criminal Appeals affirmed the accused’s sentence. The United States Supreme Court denied certiorari (514 US 112, 131 L Ed 2d 857, 115 S Ct 1967). Subsequently, the Court of Criminal Appeals dismissed on the merits the accused’s state habeas corpus application, which was based on the accused’s assertion that his jury instruction violated the Federal Constitution’s Eighth Amendment (132 SW3d 407).

Granting certiorari and granting leave to proceed in forma pauperis, the Supreme Court reversed and remanded. In a per curiam opinion expressing the views of REHNQUIST, Ch. J., and STEVENS, O’CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., it was held that:

(1) Because the proffered mitigating evidence was relevant, the Eighth Amendment required the trial

court to empower the jury with a vehicle capable of giving effect to that evidence.

(2) The nullification instruction was constitutionally inadequate, for under the instruction, (a) the jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence; (b) the burden of proof on the state was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence presented; and (c) the jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.

SCALIA, J., joined by THOMAS, J., dissenting, expressed the view that the judgment of the Texas Court of Criminal Appeals concerning the habeas corpus application ought to be affirmed.

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KOONS BUICK PONTIAC GMC, INC., Petitioner

v

BRADLEY NIGH

543 US —, 160 L Ed 2d 389, 125 S Ct 460

[No. 03-377]

Argued October 5, 2004.

Decided November 30, 2004.

**Decision:** Statutory damages limits (\$100/\$1,000) in Truth in Lending Act provision (15 USCS § 1640(a)) for violations involving personal-property loans held to have been unaltered by 1995 amendment increasing § 1640(a) damages range for violations concerning loans secured by real property.

## SUMMARY

As enacted in 1968, the Truth in Lending Act (TILA) (15 USCS §§ 1601 et seq.) provided in 15 USCS § 1640: “(a) [A]ny creditor who fails in connection with any consumer credit transaction to disclose to any person any information required . . . is liable to that person in an amount . . . of . . . (1) twice the amount of the finance charge in connection with the transaction, except that liability under this paragraph shall not be less than \$100 nor greater than \$1,000 . . . .”

In 1974, Congress amended § 1640 to provide: “(a) [A]ny creditor who fails to comply with any requirement imposed under this chapter . . . is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure; (2)(A) in the case of an individual action

twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000 . . . .”

In 1976, Congress further amended § 1640(a) to provide: “(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000 . . . .”

Finally, in 1995, Congress added to § 1640(a)(2)(A): “(iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000 . . . .”

A truck buyer brought against the seller, which had made with the buyer a retail installment sales contract, a suit in which the buyer (1) alleged a TILA violation; and (2) sought to recover \$24,192.80, which was twice the amount of the contractual finance charges. When a Federal District Court held that the buyer’s damages were not capped at \$1,000, a jury awarded damages of \$24,192.80. The United States Court of Appeals for the Fourth Circuit affirmed (319 F3d 119).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by GINSBURG, J., joined by REHNQUIST, Ch. J., and STEVENS, O’CONNOR, KENNEDY, SOUTER, and BREYER, JJ., it was held that the buyer’s damages could not exceed \$1,000, because TILA’s 1995 amendment had left unaltered the \$100/\$1,000 statutory damages limits—originally contained in § 1640(a)(1) and currently contained in § 1640(a)(2)(A)(ii)—for TILA violations involving

personal-property loans, as (1) neither the text nor the history of the statute suggested otherwise, and (2) there was scant indication that Congress had meant to change the well-established meaning of clause (i).

STEVENS, J., joined by BREYER, J., concurring, said that the history of § 1640(a) made it clear that Congress had not intended its 1995 amendment adding clause (iii) to repeal the pre-existing interpretation of clause (i) as being limited by the ceiling contained in clause (ii).

KENNEDY, J., joined by REHNQUIST, Ch. J., concurring, expressed the view that the court properly had consulted extratextual sources to obtain a full understanding of the congressional intent with respect to the 1995 addition of clause (iii) to TILA.

THOMAS, J., concurring in the judgment, said that the conclusion that Congress, in amending TILA in 1995, had tacked on a provision addressing a very specific set of transactions otherwise covered by TILA, but not materially altering the provisions at issue in the case at hand, was made clear by the (1) text of § 1640(a)(2)(A) prior to the 1995 amendment, (2) consistent interpretation that the Federal Courts of Appeals had given to the statutory language prior to the amendment, and (3) text of the amendment.

SCALIA, J., dissenting, expressed the view that (1) dispositive weight ought to be given to the structure of § 1640(a)(2)(A); and (2) that structure indicated that the \$100/\$1,000 limits were (a) part of clause (ii), and (b) thus did not apply to clause (i).

**COUNSEL**

Donald B. Ayer argued the cause for petitioner.  
A. Hugo Blankingship, III argued the cause for  
respondent.

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CITY OF SAN DIEGO, CALIFORNIA et al., Petitioners  
v  
JOHN ROE

543 US —, 160 L Ed 2d 410, 125 S Ct 521

[No. 03-1669]

Decided December 6, 2004.

**Decision:** Dismissal of police officer, for offering for sale items such as videos showing officer stripping off police uniform and engaging in sexual acts, held not to violate officer's free speech right under Federal Constitution's First Amendment.

### SUMMARY

A city police officer in California made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of an online auction site under (1) a user name that was a word play on a high-priority police radio call, and (2) a seller profile that identified him as employed in the field of law enforcement. The uniform, although apparently not the specific one worn by the city's police officers, was clearly identifiable as a police uniform. However, the officer also offered, for online sale, official uniforms of the city's police department.

After the officer's supervisor discovered the officer's activities, the police department began an investigation. In response to a request by an undercover investigator, the officer produced and sold a sexually explicit custom video. The investigator concluded that the officer's activities violated department policies as to

unbecoming conduct, immoral conduct, and outside employment. The police department ordered the officer to cease his activities. Although the officer removed some of the items he had offered for sale, he did not change his seller's profile. The department cited the officer for disobedience of lawful orders and dismissed the officer.

The officer brought suit in the United States District Court for the Southern District of California against the city, the police department, and various department officials pursuant to 42 USCS § 1983. The suit alleged that the dismissal had violated the officer's right to free speech under the Federal Constitution's First Amendment. In granting summary judgment to the city, the District Court concluded that the officer had not demonstrated that his sales activities qualified as constitutionally protected expression relating to a matter of public concern.

The United States Court of Appeals for the Ninth Circuit, in reversing and ordering a remand, said that the officer's conduct fell within the category of citizen commentary on matters of public concern, for the officer's expression (1) was not an internal workplace grievance, (2) took place while he was off-duty and away from his employer's premises, and (3) was unrelated to his employment (356 F3d 1108).

The United States Supreme Court granted certiorari and reversed. In a per curiam opinion expressing the unanimous view of the court, it was held that the city was not barred by the First Amendment from terminating the police officer, for:

(1) Although the officer's activities took place outside the workplace and purported to be about subjects not related to the officer's employment, the department demonstrated legitimate and substantial interests of its own that were compromised by the officer's speech.

(2) The officer's expression did not qualify as a matter of public concern under any view of the public-concern test.

(3) The officer's activities—which were widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image—were nothing like the private remarks at issue in a previous Supreme Court decision, in which the comments of one government worker to another on an item of political news were held to touch on matters of public concern.

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STATE OF KANSAS, Plaintiff  
v  
STATE OF COLORADO  
543 US —, 160 L Ed 2d 418, 125 S Ct 526  
[No. 105, Orig.]

Argued October 4, 2004.  
Decided December 7, 2004.

**Decision:** In original action initially brought by Kansas against Colorado for allegedly violating Arkansas River Compact (63 Stat 145), Kansas' exceptions to Special Master's report overruled, Special Master's recommendations accepted, and case recommitted to Special Master.

## SUMMARY

The Arkansas River flows through the states of Colorado, Kansas, Oklahoma, and Arkansas and empties into the Mississippi River. In 1949, Congress approved the Arkansas River Compact (63 Stat 145), an agreement between Colorado and Kansas that was intended to divide the Arkansas River's upper waters.

In 1986, the United States Supreme Court granted Kansas leave to file a bill of complaint alleging some violations of the Compact by Colorado (475 US 1079, 89 L Ed 2d 712, 106 S Ct 1454). Eventually, a Special Master filed a report which recommended that the court find that Colorado had violated the Compact, through post-Compact well pumping that had materially depleted the "usable" flow of Arkansas River water at the Colorado-Kansas border. The court (1) overruled some exceptions by both states to the Special Master's

report, and (2) remanded the case to the Special Master (514 US 673, 131 L Ed 2d 759, 115 S Ct 1733). Later, the Supreme Court overruled some exceptions by Colorado to a second report by the Special Master, without prejudice to Colorado's right to renew those exceptions at the conclusion of the Special Master's remedial proceedings (522 US 1073, 139 L Ed 2d 750, 118 S Ct 849).

In 2001, after the Special Master had filed a third report, the Supreme Court (1) overruled several exceptions by both states to the third report; (2) partially sustained one objection by Colorado, insofar as the objection had challenged the award of interest for the years prior to 1985; (3) held that prejudgment interest ought to be paid from 1985; and (4) again remanded the case to the Special Master (533 US 1, 150 L Ed 2d 72, 121 S Ct 2023). Subsequently, the Special Master filed a fourth report.

On exceptions by Kansas to the Special Master's fourth report, the Supreme Court overruled Kansas' exceptions, accepted the Special Master's recommendations, and recommitted the case to the Special Master for preparation of a decree. In an opinion by BREYER, J., expressing the unanimous view of the court as to holdings 1 and 3-6 below, and joined by REHNQUIST, Ch. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., as to holding 2 below, it was held that:

(1) The court (a) would not appoint a River Master (as Kansas had requested), and (b) instead, would retain continuing jurisdiction for a limited period of time to permit the Special Master to resolve any lingering issues, subject to the court's review.

(2) With respect to awarding money to Kansas, in view of the Supreme Court's 2001 decision, prejudgment interest was to be calculated only from 1985 onward

and on (post-1985) late damages alone, so as completely to exempt any earlier damages from prejudgment interest.

(3) A 10-year measurement period (rather than a 1-year period, as Kansas had sought) was to be used in connection with a computer model that Kansas and Colorado had agreed to use to measure Colorado's future Compact compliance.

(4) With respect to the effect of a Colorado water-replacement program on measuring Colorado's future Compact compliance, the "final amounts" of replacement-plan credits to be applied toward Colorado's Compact obligations would be the amounts determined by a Colorado water court, and any appeals therefrom, where the Special Master's recommendation on this subject added that all replacement credits, no matter how determined, would be subject to the right of Kansas to seek relief under the Supreme Court's original jurisdiction.

(5) The Special Master's finding that Colorado had complied with the Compact for the period 1997-1999 would be upheld, where Kansas conceded that its objection to this finding rested upon a claim that the Special Master could not use an accounting period longer than 1 year.

(6) Some other allegedly disputed issues which Kansas had raised would not be decided at this time, where (a) some of these issues were moot, as far as the Supreme Court could tell; and (b) the passage of time would produce more accurate resolution of disputes concerning the other issues.

THOMAS, J., concurring in part and concurring in the judgment, joined the Supreme Court's opinion except with respect to prejudgment interest, as to which he expressed the view that (1) Kansas ought not to be entitled to prejudgment interest, and (2) Kansas' ex-

ception on this subject sought only to compound the "windfall" which the state had received in the Supreme Court's 2001 decision.

STEVENS, J., concurring in part and dissenting in part, joined the Supreme Court's opinion except with respect to prejudgment interest, as to which he expressed the view that prejudgment interest ought to run, starting in 1985, on all damages that had accrued from 1969, after (in the Justice's view) Colorado knew or should have known that it was violating the Compact.

### COUNSEL

John B. Draper argued the cause for plaintiff.

David W. Robbins argued the cause for defendant.

James A. Feldman argued the cause for the United States.

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KP PERMANENT MAKE-UP, INC., Petitioner

v

LASTING IMPRESSION I, INC., et al.

543 US —, 160 L Ed 2d 440, 125 S Ct 542

[No. 03-409]

Argued October 5, 2004.

Decided December 8, 2004.

**Decision:** Party raising fair-use affirmative defense to claim of trademark infringement, pursuant to Lanham Act provision (15 USCS § 1115(b)(4)), held not to have burden to negate likelihood of consumer confusion.

## SUMMARY

In 1992, a company that marketed a form of permanent cosmetic makeup registered a trademark, pursuant to a provision of the Lanham Act (15 USCS § 1051), that included the words “Micro Colors.” In 1999, the registration became incontestable, pursuant to another Lanham Act provision (15 USCS § 1065). Another seller of permanent makeup (1) claimed to have used the term “microcolor” since 1990 or 1991 on advertising flyers and since 1991 on pigment bottles; (2) produced an advertising brochure, in 1999, that used the term “microcolor” in a stylized typeface; and (3) sought a declaratory judgment, in the United States District Court for the Central District of California, that use of the term “microcolor” did not infringe the trademark holder’s exclusive right. The trademark holder asserted a Lanham Act counterclaim for trademark infringement.

The District Court, in entering summary judgment for the alleged infringer on the infringement counter-claim, concluded that the alleged infringer had made out a statutory affirmative defense of fair use under a Lanham Act provision (15 USCS § 1115(b)(4)), which afforded such a defense to a party for the use, otherwise than as a mark, of a term which was descriptive of the party's goods or services, where the term was used fairly and in good faith for such description only.

The United States Court of Appeals for the Ninth Circuit, in reversing and ordering a remand, concluded that (1) the alleged infringer could benefit from the fair-use defense only if there was no likelihood of consumer confusion between the alleged infringer's use of the term in question and the trademark holder's mark; (2) the District Court had erred in addressing the fair-use defense without considering the issue of possible consumer confusion; and (3) there were disputed material facts as to the likelihood of such confusion (328 F3d 1061).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by SOUTER, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, and GINSBURG, JJ., and joined in pertinent part by SCALIA and BREYER, JJ., it was held that a party raising the fair-use affirmative defense to a claim of trademark infringement did not have a burden to negate any likelihood that the practice complained of would confuse consumers about the origin of the goods or services affected, for:

(1) Although § 1115(b) placed a burden of proving likelihood of confusion on the party charging infringement, Congress had said nothing about likelihood of confusion in setting out the elements of the fair-use defense in § 1115(b)(4).

(2) The phrase "used fairly" in § 1115(b)(4) was not an

oblique incorporation of a likelihood-of-confusion test purportedly developed in the common law of unfair competition.

(3) It would make no sense to give the defendant a defense of showing affirmatively that the plaintiff could not succeed in proving an element such as confusion, as all the defendant needed to do was to leave the factfinder unpersuaded that the plaintiff had carried the plaintiff's own burden on that point.

(4) It would make no sense to provide an affirmative defense of no confusion plus good faith, when merely rebutting the plaintiff's case on confusion would entitle the defendant to judgment, regardless of whether there was good faith.

(5) It was unconvincing to argue that a 1988 amendment to § 1115(b)—which added an express provision that an incontestable markholder's right to exclude was subject to proof of infringement—simply failed to relieve the fair-use defendant of the burden to prove absence of confusion.

## COUNSEL

Michael Machat argued the cause for petitioner.

Patricia A. Millett argued the cause for the United States, as amicus curiae, by special leave of court.

Beth S. Brinkmann argued the cause for respondents.

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JOHN F. KOWALSKI, JUDGE, 26TH JUDICIAL CIR-  
CUIT COURT OF MICHIGAN, et al., Petitioners

v

JOHN C. TESMER, et al.

543 US —, 160 L Ed 2d 519, 125 S Ct 564

[No. 03-407]

Argued October 4, 2004.

Decided December 13, 2004.

**Decision:** Attorneys held not to have third-party standing to invoke rights of hypothetical indigent clients to challenge Michigan's system for appointing appellate counsel for indigent defendants pleading guilty.

## SUMMARY

In 1994, Michigan amended its state constitution to provide that an appeal by an accused pleading guilty or nolo contendere was to be by leave of the court and not as of right. Following this amendment, some Michigan state judges began to deny appointed appellate counsel to indigents who pleaded guilty, and the Michigan state legislature subsequently codified this practice.

In the United States District Court for the Eastern District of Michigan, two attorneys—together with three indigents who had been denied appellate counsel after pleading guilty—filed suit under 42 USCS § 1983, in which suit (1) it was alleged that the Michigan practice and statute denied indigents their federal constitutional rights to due process and equal protection, and (2) the challengers sought declaratory and injunctive relief.

The District Court issued an order holding the practice and statute unconstitutional (114 F Supp 2d 603) and ultimately issued an injunction requiring Michigan state judges not to deny appellate counsel to any indigent who pleaded guilty (114 F Supp 2d 622).

A panel of the United States Court of Appeals for the Sixth Circuit, in reversing, concluded that (1) the abstention doctrine of *Younger v Harris* (1971) 401 US 37, 27 L Ed 2d 669, 91 S Ct 746, barred the suit by the three indigent challengers, who had ongoing state criminal proceedings; (2) the attorneys had third-party standing to assert the rights of indigents; and (3) the statute was constitutional (295 F3d 536). On rehearing in banc, the Court of Appeals agreed with the panel on standing, but found that the statute was unconstitutional (333 F3d 683).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by REHNQUIST, Ch. J., joined by O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., it was held that the attorneys did not have third-party standing to invoke the rights of hypothetical indigent clients to challenge Michigan's system, for:

- (1) The attorneys did not have a close relationship with any person who possessed the right to challenge the system, as the attorneys relied merely on a future attorney-client relationship with as-yet-unascertained criminal defendants who would request, but be denied, the appointment of appellate counsel on the basis of the system's operation.
- (2) The attorneys had not demonstrated that there was a hindrance to the indigents' ability to advance the indigents' own constitutional rights.
- (3) The assertion that adverse state-law precedent on the merits of the constitutional claim made any resort

to the Michigan state courts futile did not justify the attorneys' third-party standing in federal court.

THOMAS, J., concurring, expressed the view that it was doubtful whether a party who had no personal constitutional right at stake in a case ought ever to be allowed to litigate the constitutional rights of others.

GINSBURG, J., joined by STEVENS and SOUTER, JJ., dissenting, expressed the view that the attorneys had standing, for the attorneys had shown (1) injury in fact, (2) a close relation to indigent defendants who were seeking the assistance of counsel to appeal from plea-based convictions, and (3) a formidable hindrance to the indigents' ability to proceed without the aid of counsel.

## COUNSEL

Thomas L. Casey argued the cause for petitioners.  
David A. Moran argued the cause for respondents.

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GERALD DEVENPECK, et al., Petitioners

v

JEROME ANTHONY ALFORD

543 US —, 160 L Ed 2d 537, 125 S Ct 588

[No. 03-710]

Argued November 8, 2004.

Decided December 13, 2004.

**Decision:** For purposes of determining lawfulness, under Federal Constitution's Fourth Amendment, of warrantless arrest, offense for which there is probable cause held not required to be "closely related" to offense stated by arresting officer at time of arrest.

## SUMMARY

A Washington state patrol officer, assertedly concerned that an individual might be impersonating a police officer, radioed his supervisor and pulled over the individual's car, which had flashing headlights. An investigation followed. After the supervisor arrived, the supervisor found, among other matters, that the individual had been tape recording his conversations with the two officers. The supervisor (1) told the individual that he was under arrest for allegedly violating the state's privacy statute, and (2) directed the first officer to take the individual to jail. Later, the supervisor discussed, with a deputy county prosecutor, the situation and some possible state-law criminal charges, including the privacy-statute violation, impersonating a police officer, making a false representation to an officer, and obstructing a public servant. However, the

supervisor rejected a suggestion for multiple charges, assertedly explaining that the state patrol did not, as a matter of policy, "stack charges" against an arrestee.

At booking, the first officer (1) charged the individual with violating the privacy statute, and (2) issued a ticket to the individual for the flashing headlights. A state trial court subsequently dismissed both charges.

The individual (1) then filed suit against the two officers in a Federal District Court; and (2) asserted claims under 42 USCS § 1983 and under state law, both claims resting upon the allegation that the officers had arrested the individual without probable cause, in alleged violation of the Federal Constitution's Fourth and Fourteenth Amendments. Eventually, a jury returned a unanimous verdict in favor of the two officers. The District Court denied a motion by the individual for judgment as a matter of law or, in the alternative, for a new trial.

On appeal, the United States Court of Appeals for the Ninth Circuit, in reversing and in ordering a remand, expressed the view that the two officers could not have had probable cause to arrest the individual, because (1) they had cited only the privacy-statute charge; (2) under a state appellate-court decision several years before the individual's arrest, the tape recording of officers conducting a traffic stop was not a crime in the state of Washington; and (3) while the two officers argued that probable cause had existed to arrest the individual for the two offenses of impersonating an officer and obstructing an officer, those two offenses were not "closely related" to the privacy-statute offense invoked when the individual had been taken into custody (333 F3d 972).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by SCALIA, J., expressing the unanimous view of the eight participat-

ing members of the court, it was held that for purposes of determining whether a warrantless arrest is lawful under the Fourth Amendment, the criminal offense for which there is probable cause to arrest does not have to be "closely related" to the offense stated by the arresting officer at the time of arrest, as:

(1) Such a closely-related-offense rule would be inconsistent with Supreme Court precedent, under which an arresting officer's subjective reason for making an arrest does not need to be the criminal offense as to which the known facts objectively provide probable cause.

(2) Such a rule would have the perverse consequences that (a) officers would cease providing reasons for arrest; or (b) if that option were to be foreclosed by adoption of a statutory or constitutional requirement, then officers would give every reason for which probable cause could conceivably exist.

REHNQUIST, Ch. J., did not participate.

## COUNSEL

Maureen A. Hart argued the cause for petitioners.

James B. Comey argued the cause for the United States, as amicus curiae, by special leave of court.

R. Stuart Phillips argued the cause for respondent.

COOPER INDUSTRIES, INC., Petitioner

v

AVIALL SERVICES, INC.

543 US —, 160 L Ed 2d 548, 125 S Ct 577

[No. 02-1192]

Argued October 6, 2004.

Decided December 13, 2004.

**Decision:** Private party, potentially liable for cleaning up property contaminated by hazardous substances, that had not been sued under § 106 or § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), held unable to obtain contribution under § 113(f)(1) of CERCLA from another allegedly liable party.

## SUMMARY

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA) (42 USCS § 9613(f)(1)), allows some potentially responsible persons (PRPs), who have undertaken efforts to clean up properties contaminated by hazardous substances, to seek contribution from other parties allegedly liable under CERCLA. Congress added § 113(f)(1) to CERCLA after there had been litigation as to whether such contribution could be obtained. Section 113(f)(1) includes both (1) an enabling clause, specifying that a “person may seek contribution . . . during or following any civil action” under § 106 or § 107(a) of CERCLA (42 USCS § 9606 or § 9607(a)); and (2) a saving clause, providing that “[n]othing in this subsection shall diminish the

right of any person to bring an action for contribution in the absence of a civil action under" § 106 or § 107.

With respect to four aircraft-engine-maintenance sites in Texas, a later private owner discovered that both it and (allegedly) a prior private owner had contaminated the sites with petroleum and other hazardous substances. Under the state's supervision, the later owner cleaned up the sites. However, the later owner was not subjected to (1) a civil action under § 106 or § 107(a), or (2) an administrative order under § 106.

In 1997, the later owner filed an action against the prior owner in the United States District Court for the Northern District of Texas, seeking to recover cleanup costs. The original complaint asserted a claim for cost recovery under § 107(a), a separate claim for contribution under § 113(f)(1), and state-law claims. Subsequently—and assertedly in order to comply with United States Court of Appeals for the Fifth Circuit precedent—the later owner amended the complaint, combining the two CERCLA claims into a single CERCLA claim which alleged that, pursuant to § 113(f)(1), the later owner was entitled to seek contribution from the prior owner, as a PRP under § 107(a), for the response costs and other liability that the later owner supposedly had incurred in connection with the Texas sites.

When both parties moved for summary judgment, the District Court (1) granted the prior owner's motion; (2) expressed the view that (a) the later owner, having abandoned its § 107 claim, sought contribution only under § 113(f)(1), and (b) such § 113(f)(1) relief was unavailable to the later owner, because it had not been sued under § 106 or § 107; and (3) declined to exercise jurisdiction over the state-law claims (2000 US Dist LEXIS 520).

On appeal, a Court of Appeals panel initially affirmed (263 F3d 134). However, on rehearing en banc, the Court of Appeals instead reversed and ordered a remand, as the en banc court expressed the view that (1) § 113(f)(1) allowed a PRP to obtain contribution from other PRPs, regardless of whether the first PRP had been sued under § 106 or § 107; and (2) in such circumstances, it was unnecessary to decide whether the later owner's pleadings sought contribution under "the § 107 implied action" as well as under § 113(f)(1) (312 F3d 677).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by THOMAS, J., joined by REHNQUIST, Ch. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., it was held that:

(1) The later owner had no claim against the prior owner for contribution under § 113(f)(1), because a potentially-liable private party, who had not been sued under § 106 or § 107(a), could not obtain contribution under § 113(f)(1) from other allegedly liable parties, as:

(a) The natural meaning of § 113(f)(1)'s enabling clause was that contribution could only be sought subject to the specified conditions.

(b) The sole function of § 113(f)(1)'s saving clause was to rebut any presumption that the express right of contribution provided by § 113(f)(1)'s enabling clause was exclusive.

(c) Consideration of § 113 as a whole supported the conclusion that § 113(f)(1) did not authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action.

(d) Given the clear meaning of § 113(f)(1)'s text, there was no need to resolve a dispute concerning CERCLA's purpose or to consult that purpose at all.

(2) In view of this § 113(f)(1) holding, and under the

circumstances, the Supreme Court declined to address some § 107 questions as to whether the later owner (a) could recover costs under § 107 even though the later owner was a PRP; (b) had waived the first § 107 question; or (c) had an implied right to contribution under § 107.

GINSBURG, J., joined by STEVENS, J., dissenting, expressed the view that the Supreme Court unnecessarily deferred, and ought not to defer, making a definitive ruling on the question whether the later owner could properly pursue a § 107 claim for relief against the prior owner.

## COUNSEL

William B. Reynolds argued the cause for petitioner.  
Jeffrey P. Minear argued the cause for the United States, as amicus curiae, by special leave of court.

Richard O. Faulk argued the cause for respondent.

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FLORIDA, Petitioner

v

JOE ELTON NIXON

543 US —, 160 L Ed 2d 565, 125 S Ct 551

[No. 03-931]

Argued November 2, 2004.

Decided December 13, 2004.

**Decision:** Defense counsel's strategy in Florida capital trial—of conceding commission of murder and concentrating on establishing cause for sparing defendant's life—held not to constitute ineffective assistance of counsel if representation did not fall below objective standard of reasonableness.

## SUMMARY

After an accused was indicted in Florida for murder, the public defender assigned to represent the accused filed a plea of not guilty and deposed all of the state's potential witnesses. Later, the public defender—having concluded, given the strength of the evidence, that the accused's guilt was not subject to any reasonable doubt—tried unsuccessfully to persuade the prosecution, in exchange for the accused's guilty plea, to drop the prosecution's recommendation of the death penalty.

The public defender, who was experienced in capital defense, then proposed (1) to concede, at the guilt phase of the upcoming capital trial, the accused's commission of murder; and (2) to concentrate the defense on establishing, at the penalty phase, cause for sparing the accused's life. The public defender at-

tempted to explain this strategy to the accused at least three times. However, the accused (1) was generally unresponsive during their discussions, and (2) never verbally approved or protested the proposed strategy. Eventually, the public defender decided to pursue the concession strategy.

At trial, the public defender (1) acknowledged the accused's guilt; (2) urged the jury to focus on the penalty phase; (3) objected to the introduction of crime-scene photographs as unduly prejudicial; (4) actively contested several aspects of the jury instructions; (5) presented the testimony of eight witnesses; (6) emphasized the accused's youth, the psychiatric evidence, and the jury's discretion to consider any mitigating circumstances; (7) urged that if not sentenced to death, then the accused would never be released from confinement; and (8) at the close of the penalty phase, was commended by the trial court, which said that (a) the public defender's tactic reflected an excellent analysis of the reality of the case, (b) the evidence of guilt would have persuaded any jury beyond all doubt, and (c) for the public defender to have inferred that the accused was not guilty would have deprived the public defender of any credibility during the penalty phase.

The Florida Supreme Court (1) on direct appeal, remanded for an evidentiary hearing on whether the accused had consented to the public defender's strategy (572 So 2d 1336); (2) later remanded for a further hearing on the consent issue (758 So 2d 618); and (3) ultimately, reversed and remanded for a new trial (857 So 2d 172).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by GINSBURG, J., expressing the unanimous view of the eight participating members of the court, it was held that the public

defender's strategic decision, made without the accused's express consent—to concede, at the guilt phase of the trial, the accused's commission of murder, and to concentrate the defense on establishing, at the penalty phase, cause for sparing the accused's life—did not, however gruesome the crime and despite the strength of the evidence of guilt, automatically rank as prejudicial ineffective assistance of counsel necessitating a new trial, as:

- (1) In a capital case, counsel had to consider in conjunction both the guilt and penalty phases in determining how best to proceed.
- (2) When counsel informed the accused of the strategy that counsel believed to be in the accused's best interest and the accused was unresponsive, counsel's strategic choice was not impeded by any blanket rule demanding the accused's explicit consent.
- (3) Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, did not fall below an objective standard of reasonableness, then that was the end of the matter; no tenable claim of ineffective assistance would remain.

REHNQUIST, Ch. J., did not participate.

## COUNSEL

George S. Lemieux argued the cause for petitioner.

Irving L. Gornstein argued the cause for the United States, as amicus curiae, by special leave of court.

Edward H. Tillinghast, III argued the cause for respondent.

ROCHELLE BROSSEAU, Petitioner

v

KENNETH J. HAUGEN

543 US —, 160 L Ed 2d 583, 125 S Ct 596

[No. 03-1261]

Decided December 13, 2004.

**Decision:** Police officer held entitled to qualified immunity from 42 USCS § 1983 claim that in 1999, officer had violated Federal Constitution's Fourth Amendment by allegedly shooting individual who had been attempting to flee from law-enforcement officers in motor vehicle.

## SUMMARY

The United States Supreme Court has generally determined that even if a state or local officer's conduct was unconstitutional, the officer is entitled to qualified immunity from a subsequent 42 USCS § 1983 claim for damages, if the law at the time of the officer's conduct did not clearly establish that the conduct would violate the Federal Constitution.

Allegedly, on February 21, 1999, a police officer in the state of Washington shot an individual in the back as the individual was attempting to flee from law-enforcement authorities in a motor vehicle. The individual subsequently (1) filed an action in the United States District Court for the Western District of Washington; and (2) included a § 1983 claim against the police officer, alleging that the shooting had constituted excessive force in violation of the individual's federal constitutional rights. However, the District

Court, in granting summary judgment to the officer, found that the officer was entitled to qualified immunity from the § 1983 claim.

The United States Court of Appeals for the Ninth Circuit, in reversing in pertinent part and in ordering a remand, expressed the view that summary judgment should not have been granted to the officer with respect to the § 1983 claim, for—when the evidence was construed in the light most favorable to the individual—the officer’s alleged use of deadly force had violated (1) the Constitution’s Fourth Amendment; and (2) then-clearly-established law, as set forth in a 1985 Supreme Court case which had discussed the use of deadly force (339 F3d 857; amended, rehearing denied, and rehearing en banc denied, 351 F3d 372).

Granting certiorari, the Supreme Court reversed and remanded. In a per curiam opinion expressing the view of REHNQUIST, Ch. J., and O’CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., it was held that the officer was entitled to qualified immunity from the individual’s § 1983 claim, because even if the material facts were construed in a light most favorable to the individual—and regardless of whether the officer’s alleged conduct had violated the individual’s Fourth Amendment rights—the cases decided as of that time did not clearly establish that the officer’s alleged conduct had violated the individual’s Fourth Amendment rights, for:

(1) Even though two prior Supreme Court cases—the 1985 case and one from 1989—had generally established that such excessive-force claims were to be judged under the Fourth Amendment’s “objective reasonableness” standard, the case at hand was far from the obvious one where those two prior cases could, by themselves, offer a basis for decision.

(2) Given that the parties had pointed to only a handful

of pre-1999 lower-federal-court cases that were relevant to the situation which the officer in the case at hand allegedly had confronted—as to whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area were at risk from that flight—these few cases (a) showed that this area was one in which the result depended very much on the facts of each case; and (b) suggested that the officer's alleged actions had fallen in the hazy border between excessive and acceptable force.

BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring, expressed the view the Supreme Court ought to reconsider a rigid rule, established under a 2001 Supreme Court case, that lower courts were required to evaluate claims of qualified immunity by deciding (1) the federal constitutional question prior to deciding (2) the qualified-immunity question.

STEVENS, J., dissenting, expressed the view that (1) under the Fourth Amendment, it was objectively unreasonable for the officer in question to have used deadly force against the individual in an attempt to prevent the individual's escape; (2) while it was not clear whether the officer was nonetheless entitled to qualified immunity, that question ought to have been answered by a jury; and (3) the Supreme Court should not have summarily reversed the Court of Appeals' judgment, without the benefit of full briefing and oral argument.

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DAVID WHITFIELD, Petitioner

v

UNITED STATES (No. 03-1293)

HAYWOOD EUDON HALL, aka DON HALL, Petitioner

v

UNITED STATES (No. 03-1294)

543 US —, 160 L Ed 2d 611, 125 S Ct 687

Argued November 30, 2004.

Decided January 11, 2005.

**Decision:** Federal criminal conviction for conspiracy to commit money laundering, in asserted violation of 18 USCS § 1956(h), held not to require proof of overt act in furtherance of alleged conspiracy.

## SUMMARY

As originally enacted as part of the Money Laundering Control Act of 1986 (PL 99-570), neither 18 USCS § 1956 nor 18 USCS § 1957 included a conspiracy provision. However, in 1992, Congress enacted 18 USCS § 1956(h), providing that “[a]ny person who conspires to commit any offense defined in [§ 1956] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.”

In 1999, a federal grand jury indicted several defendants on charges including conspiracy to launder money, in asserted violation of § 1956(h). This indictment described, in general terms, the “manner and means” allegedly used to accomplish the conspiracy’s

objects, but did not charge the defendants with the commission of any overt act in furtherance of the alleged conspiracy. Moreover, at trial, a Federal District Court denied a defense request to instruct the jury that proof of such an overt act was required. The jury returned a verdict of guilty on the § 1956(h) charge.

The United States Court of Appeals for the Eleventh Circuit, in affirming in pertinent part, expressed the view § 1956(h) did not require proof of an overt act (349 F3d 1320).

On certiorari, the United States Supreme Court affirmed. In an opinion by O'CONNOR, J., expressing the unanimous view of the court, it was held that a conviction for conspiracy to commit money laundering, in asserted violation of § 1956(h), did not require proof of an overt act in furtherance of the alleged conspiracy, for:

- (1) Under the governing overt-act rule for federal conspiracy statutes (as distilled in a 1994 Supreme Court decision, on the basis of two Supreme Court decisions from 1913 and 1945), because the text of § 1956(h) did not expressly make the commission of an overt act an element of the conspiracy offense, the Federal Government did not need to prove an overt act to obtain a conviction.
- (2) Because the meaning of § 1956(h)'s text was plain and unambiguous, there was no need to consider the legislative history.
- (3) Even if the legislative history were considered, the same no-overt-act conclusion would be reached, in view of factors including the governing overt-act rule.
- (4) Some other contrary arguments, based on the asserted text and structure of § 1956 as a whole, were unpersuasive.

**COUNSEL**

Sharon C. Samek argued the cause for petitioners.  
Jonathan L. Marcus argued the cause for respondent.

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UNITED STATES, Petitioner  
v  
FREDDIE J. BOOKER (No. 04-104)

UNITED STATES, Petitioner  
v  
DUCAN FANFAN (No. 04-105)

543 US —, 160 L Ed 2d 621, 125 S Ct 738

Argued October 4, 2004.

Decided January 12, 2005.

**Decision:** Sixth Amendment jury-trial right held to apply to Federal Sentencing Guidelines (18 USCS Appx); Guidelines made effectively advisory by severance of statutory provisions concerning mandatory applicability; these holdings held to apply to all cases currently pending on direct review.

### SUMMARY

In *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, which involved a state criminal statute, the United States Supreme Court held that the Federal Constitution requires that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Subsequently, in *Blakely v Washington* (2004, US) 159 L Ed 2d 403, 124 S Ct 2531, which involved state criminal statutes, the court held, pursuant to the Constitution's Sixth Amendment right to a jury trial, that other than the fact

of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. As each of these cases involved state crimes, neither involved the Federal Sentencing Guidelines (Guidelines) (18 USCS Appx).

Under the Guidelines, the maximum prison sentence authorized by the findings of the jury, with respect to its guilty verdict at a particular accused's trial in a Federal District Court for violation of a federal statute prohibiting possession of cocaine, was 262 months. However, at the sentencing hearing, the trial judge (1) made some additional findings by a preponderance of the evidence; and (2) because these findings mandated under the Guidelines a minimum sentence of 360 months, imposed a 360-month sentence. The United States Court of Appeals for the Seventh Circuit (1) held that the judge's application of the guidelines conflicted with the Supreme Court's holding in *Apprendi*; (2) relied on the Supreme Court's holding in *Blakely*; and (3) concluded that the accused's sentence violated the Sixth Amendment (375 F3d 508).

A second accused, who also had been charged with violating a federal drug statute, was convicted in a Federal District Court by a jury whose findings authorized a maximum prison sentence of 78 months. At the sentencing hearing, the trial judge (1) found by a preponderance of the evidence additional facts that under the Guidelines would have authorized a prison sentence in the 188-to-235 month range; but (2) relying on *Blakely*, imposed a sentence that was "based solely on the guilty verdict in this case." Following the denial of a motion to correct the accused's sentence, the government filed (1) a notice of appeal in the United States Court of Appeals for the First Circuit; and (2) a

petition, which the Supreme Court granted, for a writ of certiorari before judgment.

On certiorari, the Supreme Court (1) affirmed and remanded with respect to the first accused, and (2) vacated and remanded with respect to the second accused. In two opinions of the court that expressed the views of different alignments of five Justices, it was held that:

(1) The Sixth Amendment guarantee of a right to a jury trial, as construed in Blakely, applied to the Guidelines. (Accordingly (a) the first accused's sentence violated the Sixth Amendment, and (b) the court reaffirmed its Apprendi holding concerning sentences exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict.)

(2) The proper remedy was to (a) hold unconstitutional two of the Act's provisions, 18 USCS § 3553(b)(1), which made the Guidelines mandatory, and 18 USCS § 3742(e), which depended on the Guidelines' mandatory nature, (b) sever these two provisions, and (c) excise them.

(3) So modified, the Act made the Guidelines effectively advisory.

(4) These holdings applied to all cases currently pending on direct review, including the two consolidated cases at hand.

STEVENS, J., joined by SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., delivering the opinion of the court in part, expressed the view that:

(1) The Sixth Amendment right to a jury trial, as construed in Blakely, applied to the Guidelines, as:

(a) There was no distinction of constitutional significance between the Guidelines and the state procedures at issue in Blakely.

(b) Three arguments advanced by the government against applying the court's Blakely reasoning to the

Guidelines—that (i) Blakely was distinguishable on the basis that the Guidelines were promulgated by a commission rather than a legislature, (ii) four earlier Supreme Court decisions were inconsistent with Blakely, and (iii) application of Blakely to the Guidelines would conflict with separation-of-powers principles—were unpersuasive.

(c) As to possible reduction in sentencing efficiency, the interest in fairness and reliability protected by the right to a jury trial had always outweighed the interest in concluding trials swiftly.

(2) Accordingly, the court was reaffirming its *Apprendi* holding that the Constitution requires that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

BREYER, J., joined by REHNQUIST, Ch. J., and O'CONNOR, KENNEDY, and GINSBURG, JJ., delivering the opinion of the court in part, expressed the view that: (1) The proper remedy for conflict between the Guidelines and the Sixth Amendment was to hold unconstitutional two Federal Sentencing Act provisions—§ 3553(b)(1), which made the Guidelines mandatory, and § 3742(e), which depended on the Guidelines' mandatory nature—to sever these two provisions, and to excise them, as Congress would likely have preferred the excision of some of the Act, namely the Act's mandatory language, to invalidation of the entire Act.

(2) So modified, the Act made the Guidelines effectively advisory, as one of the Act's remaining provisions (18 USCS § 3553(a)) (a) required a sentencing court to consider Guideline ranges, but (b) permitted the court

to tailor the sentence in light of other statutory concerns.

(3) The Supreme Court's holdings in the two consolidated cases at hand concerning the Guidelines had to be applied to all cases, including the cases at hand, currently pending on direct review.

STEVENS, J., joined by O'CONNOR, J., and joined in pertinent part by SCALIA, J., dissenting in part, expressed the view that, although the Sixth Amendment jury-trial requirement applied to the Guidelines, this did not require modification of the Sentencing Act, as (1) the government could comply with the Sixth Amendment under the Act as written by proving any fact required to increase a sentence under the Guidelines to a jury beyond a reasonable doubt; and (2) a requirement of jury factfinding for certain issues could be implemented without difficulty in the vast majority of cases.

SCALIA, J., dissenting in part, expressed the view that the Supreme Court's opinion concerning the remedy (1) in order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, discarded the provisions that eliminated discretionary sentencing; and (2) did not even pretend to honor the principle that sentencing discretion was unreviewable except pursuant to specific statutory direction.

THOMAS, J., dissenting in part, expressed the view that (1) § 3553(b)(1), some provisions of the Guidelines, and a particular Federal Rule of Criminal Procedure were unconstitutional as applied to the first accused; (2) the government had not overcome the presumption of severability with respect to these provisions; and (3) accordingly, the unconstitutional application of the sentencing scheme in the first accused's case was

severable from the constitutional applications of the same scheme to other defendants.

BREYER, J., joined by REHNQUIST, Ch.J., and O'CONNOR and KENNEDY, JJ., dissenting in part, expressed the view that nothing in the Sixth Amendment forbade a sentencing judge from determining (as judges at sentencing had traditionally determined) the manner or way in which the offender carried out the crime of which the offender was convicted, as history did not support a "right to jury trial" in respect to sentencing facts, where traditionally, the law had distinguished between facts that were elements of crimes and facts that were relevant only to sentencing.

## COUNSEL

Paul D. Clement argued the cause for petitioner.

T. Christopher Kelly argued the cause for respondent in No. 04-104.

Rosemary Scapicchio argued the cause for respondent in No. 04-105.

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KEYSE G. JAMA, Petitioner

v

IMMIGRATION AND CUSTOMS ENFORCEMENT

543 US —, 160 L Ed 2d 708, 125 S Ct 694

[No. 03-674]

Argued October 12, 2004.

Decided January 12, 2005.

**Decision:** Alien held removable, under 8 USCS § 1231(b)(2)(E)(iv), from the United States to country of alien's birth without explicit advance consent of that country's government.

## SUMMARY

Under 8 USCS § 1231(b)(2), an alien who was ineligible to remain in the United States was to be removed (1) to the country of the alien's choice, unless a condition eliminating that command was satisfied; (2) otherwise, to the country of which the alien was a citizen, unless a condition eliminating that command was satisfied; and (3) otherwise—as specified in subparagraph (E), clauses (i) to (vi)—to a country with which the alien had a lesser connection, such as the country of the alien's birth (clause iv). Section 1231(b)(2)(E)(vii) provided that if removal under clauses (i) to (vi) was “impracticable, inadvisable or impossible,” the alien was to be removed to “another country” whose government would accept the alien.

An alien who was born in Somalia and remained a citizen of that nation was admitted to the United States as a refugee, but his refugee status was terminated in 2000 by reason of a criminal conviction. The former

Immigration and Naturalization Service (whose immigration-enforcement functions were subsequently transferred to the Bureau of Immigration and Customs Enforcement) brought an action to remove the alien from the United States. At an administrative hearing before an Immigration Judge, the alien declined to designate a country to which he preferred to be removed. The Immigration Judge ordered the alien removed to Somalia, and the Board of Immigration Appeals affirmed that determination.

In collateral proceedings, instituted under 28 USCS § 2241 in the United States District Court for the District of Minnesota, the alien alleged that (1) Somalia had no functioning government and thus could not consent in advance to his removal, and (2) the Federal Government was barred from removing him to Somalia absent such advance consent. The District Court, in granting habeas corpus relief to the alien, agreed that the alien could not be removed to a country that had not consented in advance to receive him (2002 US Dist LEXIS 5731).

However, the United States Court of Appeals for the Eighth Circuit, in reversing and in ordering a remand, concluded that § 1231(b)(2)(E)(iv) did not require acceptance by the destination country (329 F3d 630).

On certiorari, the United States Supreme Court affirmed. In an opinion by SCALIA, J., joined by REHNQUIST, Ch.J., and O'CONNOR, KENNEDY, and THOMAS, JJ., it was held that under § 1231(b)(2)(E)(iv), an alien could properly be removed from the United States to the country of the alien's birth without the explicit advance consent of that country's government, for, among other considerations:

(1) In all of subparagraph (E), an acceptance requirement appeared only in clause (vii). Inclusion of the word "another" in clause (vii) did not serve as a means

of importing the acceptance requirement into clauses (i) through (vi), as such a reading was contrary to the grammatical rule of the last antecedent.

(2) An acceptance requirement was not manifest in the entire structure of § 1231(b)(2).

(3) To infer an absolute rule of acceptance where Congress had not clearly set forth such a rule (a) would have run counter to the Supreme Court's customary policy of deference to the President in matters of foreign affairs, and (b) was not necessary in order to insure that appropriate consideration would be given to conditions in the country of removal.

SOUTER, J., joined by STEVENS, GINSBURG, and BREYER, JJ., dissenting, expressed the view that (1) all seven removal countries in § 1231(b)(2)(E) were subject to the condition of the foreign government's acceptance of the alien into the country; and (2) the Supreme Court's contrary conclusion was inconsistent with the text, structure, history, and legislative history of the statute in question.

## COUNSEL

Jeffrey Keyes argued the cause for petitioner.

Malcolm L. Stewart argued the cause for respondent.

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A. NEIL CLARK, FIELD OFFICE DIRECTOR, SE-  
ATTLE, WASHINGTON, IMMIGRATION AND CUS-  
TOMS ENFORCEMENT, et al., Petitioners

v

SERGIO SUAREZ MARTINEZ (No. 03-878)

DANIEL BENITEZ, Petitioner

v

MICHAEL ROZOS, FIELD OFFICE DIRECTOR, MI-  
AMI, FLORIDA, IMMIGRATION AND CUSTOMS  
ENFORCEMENT (No. 03-7434)

543 US —, 160 L Ed 2d 734, 125 S Ct 716

Argued October 13, 2004.

Decided January 12, 2005.

**Decision:** Construction of 8 USCS § 1231(a)(6) in *Zadvydas v Davis* (2001) 533 US 678, 150 L Ed 2d 653, 121 S Ct 2491—so as to authorize only limited period for detaining certain aliens who had been admitted to United States but subsequently ordered removed—held to apply to detention of inadmissible aliens.

## SUMMARY

In *Zadvydas v Davis* (2001) 533 US 678, 150 L Ed 2d 653, 121 S Ct 2491, the United States Supreme Court construed 8 USCS § 1231(a)(6) to authorize the United States Attorney General (later succeeded for this purpose by the United States Secretary of Homeland Security) to detain aliens, who had been admitted to the United States but subsequently ordered removed on some specified grounds, after an initial 90-day

statutory removal period (in 8 USCS § 1231(a)(1)(A)) only for so long as was reasonably necessary to secure the aliens' removal. Also, the *Zadvydas* court (1) recognized a presumption that the reasonably necessary period would be 6 months; (2) indicated that the court's construction of § 1231(a)(6) was being adopted in part because permitting indefinite detention "would raise a serious constitutional problem" under the due process clause of the Federal Constitution's Fifth Amendment; and (3) said that aliens who had not yet gained initial admission to the United States "would present a very different question."

Two other cases involved the effect of *Zadvydas v Davis* on the detention, purportedly under § 1231(a)(6), of aliens found inadmissible to the United States. In each case, a Cuban alien (1) had an initial parole into the United States revoked, (2) was found inadmissible, (3) was ordered removed, (4) was detained past the initial 90-day period, and (5) sought federal habeas corpus relief under 28 USCS § 2241.

In the first case, the United States District Court for the District of Oregon (1) accepted that the first alien's removal was not reasonably foreseeable, and (2) ordered the alien's release under conditions that the United States Immigration and Naturalization Service (later succeeded by organizations including the United States Bureau of Immigration and Customs Enforcement) would believe appropriate. The United States Court of Appeals for the Ninth Circuit summarily affirmed on the basis of this Court of Appeals' precedent.

However, in the second case, the United States District Court for the Northern District of Florida, while concluding that the second alien's removal would not occur in the foreseeable future, nonetheless denied the petition. The United States Court of Appeals for the

Eleventh Circuit, in affirming, expressed the view that the Zadvydas 6-months presumption of reasonableness was inapplicable to inadmissible aliens (337 F3d 1289).

On certiorari, the Supreme Court—having consolidated the two cases—affirmed the judgment of the Court of Appeals for the Ninth Circuit, reversed the judgment of the Court of Appeals for the Eleventh Circuit, and remanded both cases for further proceedings. In an opinion by SCALIA, J., joined by STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., it was held that:

(1) Zadvydas' construction of § 1231(a)(6) applied to the detention of aliens found inadmissible to the United States, for:

(a) The Zadvydas decision had reserved, rather than answered, the question presented in the cases at hand, which (i) was different from the Zadvydas question; but (ii) resulted in the same answer, because § 1231(a)(6)'s text provided for no distinction between admitted and inadmissible aliens.

(b) Even if the statutory-purpose and federal constitutional concerns that had influenced Zadvydas' statutory construction were not present for inadmissible aliens, this would not justify giving the same detention provision a different meaning when inadmissible aliens were involved.

(c) Even if the security of the nation's borders would be compromised by requiring the release of inadmissible aliens who could not be removed, Congress could attend to such a situation.

(d) With respect to the Zadvydas presumption of 6 months, the Federal Government had suggested no reason why the period reasonably necessary to effect removal would be longer for an inadmissible alien.

(2) Thus, under the circumstances, both aliens in question should have had their habeas corpus petitions granted.

O'CONNOR, J., concurring, expressed the view that (1) even under the existing statutory scheme, it was, or might be, possible for the Federal Government—in certain circumstances not shown in the cases at hand—to detain inadmissible aliens for more than 6 months after they had been ordered removed; and (2) any alien released as a result of the Supreme Court's holding in the cases at hand remained subject to the conditions of supervised release.

THOMAS, J., joined in part (as to point 1 below) by REHNQUIST, Ch. J., dissenting, expressed the view that (1) the Supreme Court's reading, in the cases at hand, of *Zadvydas v Davis* was implausible, for the *Zadvydas* court had (a) explicitly reserved the question whether the court's statutory holding applied equally to inadmissible aliens on the basis that the federal constitutional questions raised by detaining inadmissible aliens were different from those raised by detaining admitted aliens, and (b) tethered the court's reading of § 1231(a)(6) to the specific class of aliens then before the court; (2) the Supreme Court's "lowest common denominator" principle, in the cases at hand, for construing § 1231(a)(6) was (a) inconsistent with *Zadvydas v Davis* and some other prior decisions, (b) inconsistent with the history of the statutory-construction canon of avoiding federal constitutional questions, and (c) likely to have mischievous consequences; and (3) *Zadvydas v Davis* (a) had been wrong in both its statutory and its constitutional analyses, and (b) ought not to bind the Supreme Court in the cases at hand.

**COUNSEL**

Edwin S. Kneedler argued the cause for petitioners in No. 03-878 and for respondent in No. 03-7434.

Christine S. Dahl argued the cause for respondent in No. 03-878.

John S. Mills argued the cause for petitioner in No. 03-7434.

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ILLINOIS, Petitioner

v

ROY I. CABALLES

543 US —, 160 L Ed 2d 842, 125 S Ct 834

[No. 03-923]

Argued November 10, 2004.

Decided January 24, 2005.

**Decision:** Dog sniff that was performed on exterior of driver's car while driver was seized for traffic violation held not to violate Federal Constitution's Fourth Amendment under circumstances presented.

## SUMMARY

An Illinois state trooper stopped a driver for speeding on a highway. When the trooper radioed the police dispatcher to report the stop, a second trooper overheard the transmission. Although the second trooper presumably had no information about the driver except that the driver had been stopped for speeding, the second trooper headed for the scene with a narcotics-detection dog. While the first trooper was writing a warning ticket, the second trooper walked the dog around the car, and the dog alerted at the trunk. On the basis of the alert, the troopers searched the trunk, found marijuana, and arrested the driver. The entire incident lasted less than 10 minutes.

An Illinois trial court, in denying the driver's motion to suppress the seized evidence and quash the arrest, concluded that (1) the officers had not unnecessarily prolonged the stop, and (2) the dog alert was suffi-

ciently reliable to provide probable cause to conduct the search. The Appellate Court of Illinois affirmed (321 Ill App 3d 1063, 797 NE2d 250). However, the Supreme Court of Illinois, in reversing, said that because the canine sniff had been performed without any specific and articulable facts to suggest drug activity, the use of the dog had unjustifiably enlarged the scope of a routine traffic stop into a drug investigation (207 Ill 2d 504, 802 NE2d 202).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by STEVENS, J., joined by O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., it was held that the dog sniff did not violate the Federal Constitution's Fourth Amendment guarantee against unreasonable searches and seizures under the circumstances presented, for (1) the initial seizure by the first trooper had been based on probable cause and was concededly lawful; (2) the duration of the stop was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop; and (3) any intrusion on the driver's privacy expectations did not rise to the level of a constitutionally cognizable infringement.

SOUTER, J., dissenting, expressed the view that using the dog for the purpose of determining the presence of marijuana in the car's trunk was a search that was unauthorized as an incident of the speeding stop and unjustified on any other ground.

GINSBURG, J., joined by SOUTER, J., dissenting, expressed the view that even if the drug sniff was not to be characterized as a Fourth Amendment "search," the nonconsensual expansion of the seizure from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that ran afoul of the Fourth Amendment.

REHNQUIST, Ch. J., did not participate.

**COUNSEL**

Lisa Madigan argued the cause for petitioner.

Christopher A. Wray argued the cause for the United States, as amicus curiae, by special leave of court.

Ralph E. Meczyk argued the cause for respondent.

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COMMISSIONER OF INTERNAL REVENUE, Petitioner

v

JOHN W. BANKS, II (No. 03-892)

COMMISSIONER OF INTERNAL REVENUE, Petitioner

v

SIGITAS J. BANAITIS (No. 03-907)

542 US —, 159 L Ed 2d 859, 124 S Ct 826

Argued November 1, 2004.

Decided January 24, 2005.

**Decision:** As general rule for federal income tax purposes, when litigant's recovery of money judgment or settlement constituted gross income under § 61(a) of Internal Revenue Code (26 USCS § 61(a)), gross income held to include portion of recovery paid to litigant's attorney as contingent fee.

## SUMMARY

For federal income tax purposes, "gross income" is defined in § 61(a) of Internal Revenue Code (26 USCS § 61(a)) as "all income from whatever source derived."

After being discharged from his job as a California state employee, a taxpayer retained an attorney on a contingent-fee basis and filed against the state, in a United States District Court, a civil suit that alleged employment discrimination in violation of federal law. After trial had commenced in 1990, (1) the parties

settled the suit for \$464,000, and (2) the taxpayer paid \$150,000 of this amount to his attorney pursuant to the fee agreement.

In 1997, the Commissioner of Internal Revenue issued the taxpayer—who had not included any of the \$464,000 as gross income on his 1990 federal income tax return—a notice of deficiency for the 1990 tax year. The United States Tax Court, upholding the Commissioner's determination, determined that all settlement proceeds, including the \$150,000 paid to the attorney, were required to be included in the taxpayer's 1990 gross income. The United States Court of Appeals for the Sixth Circuit, reversing in part, concluded that the taxpayer's 1990 gross income (1) included the net amount of the settlement proceeds, but (2) did not include the amount paid as a contingent fee (345 F3d 373).

A second taxpayer, who had been discharged from his job with a private employer, retained an attorney on a contingent-fee basis and filed, against the employer and its successor in ownership in an Oregon state court, a suit alleging violation of state law. After a jury had awarded the taxpayer compensatory and punitive damages, and after resolution of all appeals and posttrial motions, the defendants (1) paid the taxpayer \$4,864,547; and (2) following a formula contained in the contingent-fee contract, paid an additional \$3,864,012 directly to the taxpayer's attorney.

Subsequently, the Commissioner issued to the second taxpayer—who had not included as gross income on his federal tax return the amount paid to the attorney—a notice of deficiency with respect to this amount. The Tax Court upheld the Commissioner's determination, but the United States Court of Appeals for the Ninth Circuit reversed (340 F3d 1074).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by KENNEDY, J., expressing the unanimous view of the eight participating members of the court, it was held that as a general rule, when a litigant's recovery of a money judgment or a settlement constituted gross income under § 61(a), the litigant's gross income included the portion of the recovery paid to the litigant's attorney as a contingent fee. Therefore, the contingent fees paid by the two taxpayers constituted gross income under § 61(a), as:

(1) A contingent-fee agreement ought to be viewed as an anticipatory assignment to the attorney of a portion of the client's income from any litigation recovery.

(2) Although in the context of anticipatory assignments, the assignor often did not have dominion over the income at the moment of receipt:

(a) In the case of a litigation recovery, the income-generating asset was the cause of action that derived from the plaintiff's legal injury. The plaintiff retained dominion over this asset throughout the litigation.

(b) The anticipatory-assignment doctrine was not limited to instances when the precise dollar value of the assigned income was known in advance.

(c) Both taxpayers in the cases at hand had retained control over the income-generating asset and had realized a benefit by doing so.

(3) The court rejected the suggestion to treat the attorney-client relationship as a sort of business partnership or joint venture for tax purposes, for an attorney was an agent who was duty bound to act only in the interests of the principal, and so it was appropriate to treat the full amount of a client's litigation recovery as income to the principal.

REHNQUIST, Ch. J., did not participate.

**COUNSEL**

David B. Salmons argued the cause, pro hac vice, for petitioner, by special leave of court.

Philip N. Jones argued the cause for respondent in 03-907.

James R. Carty argued the cause, pro hac vice, for respondent in 03-892, by special leave of court.

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MARLON LATODD HOWELL, aka MARLON COX,  
Petitioner  
v  
MISSISSIPPI

543 US —, 160 L Ed 2d 873, 125 S Ct 856

[No. 03-9560]

Argued November 29, 2004.  
Decided January 24, 2005.

**Decision:** Writ of certiorari, to review claim that Mississippi courts violated Eighth and Fourteenth Amendments by refusing to require jury instruction about asserted lesser-included offense, dismissed as improvidently granted, where claim not raised in state's highest court, which had not addressed it.

### SUMMARY

After a Mississippi state trial court refused an accused's request to supplement the state's proposed jury instruction on capital murder with instructions on manslaughter and simple murder, the accused was found guilty of capital murder and was sentenced to death.

On appeal to the Mississippi Supreme Court, where one of the accused's claims of error was the trial court's failure to instruct the jury on manslaughter or simple murder, the accused (1) cited three cases from the Mississippi Supreme Court about lesser-included-offense instructions but quoted the original language of only one opinion, a noncapital case; and (2) argued that, because the jury "could have found and returned

the lesser included offense of simple murder or manslaughter," the failure to give instructions on those offenses was error that left the jury no choice but either to turn he accused loose or convict him of capital murder. The Mississippi Supreme Court, referring to two of its own prior noncapital cases concerning exclusion of instructions for lesser-included offenses, (1) found that the facts of the accused's case did not warrant an instruction for manslaughter or simple murder; and (2) affirmed the accused's conviction and death sentence (860 So 2d 704).

The accused sought certiorari from the United States Supreme Court, asserting that the state courts had violated his rights under the Federal Constitution's Eighth and Fourteenth Amendments by refusing to require the jury instruction that he had requested. The court (1) granted certiorari; but (2) asked the parties to address the additional question whether the accused's federal constitutional claim had been properly raised before the Mississippi Supreme Court for purposes of 28 USCS § 1257, which gave the United States Supreme Court the power to review final judgments or decrees rendered by the highest court of a state in which a decision could be had, where any right was specially set up or claimed under federal law (542 US —, 159 L Ed 2d 811, 124 S Ct 2908).

However, the United States Supreme Court then dismissed the writ of certiorari as improvidently granted. In a per curiam opinion expressing the unanimous view of the court, the court declined to reach the merits of the accused's jury-instruction claim, because the accused had not raised this claim in the Mississippi Supreme Court, which had not addressed it, as:

(1) Under § 1257 and its predecessors, the United States Supreme Court had almost unfailingly refused to consider any federal-law challenge to a state-court

decision unless the federal claim had been either addressed by, or properly presented to, the state court that had rendered the decision of which review was sought.

(2) The accused's brief in the Mississippi Supreme Court did not properly present his claim as one arising under federal law.

(3) A litigant wishing to raise a federal issue could easily indicate the federal-law basis for the claim in a state-court petition or brief by (a) citing in conjunction with the claim, (i) the federal source of law on which the litigant relied, or (ii) a case deciding such a claim on federal grounds; or (b) simply labeling the claim "federal." The accused had done none of these things.

(4) As to the accused's contention that he had raised his federal claim by implication because the state-law rule on which he had relied was "identical" or "virtually identical" to a constitutional rule articulated in a prior United States Supreme Court case, even if it were assumed, without deciding, that identical standards might overcome a petitioner's failure to identify a claim as federal, Mississippi's rule regarding lesser-included-offense instructions was not identical to the interpretation of that prior case by the Mississippi Supreme Court.

## COUNSEL

Ronnie M. Mitchell argued the cause for petitioner.  
James M. Hood, III argued the cause for respondent.

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RICKY BELL, WARDEN, Petitioner

v

GARY BRADFORD CONE

543 US —, 160 L Ed 2d 881, 125 S Ct 847

[No. 04-394]

Decided January 24, 2005.

**Decision:** Federal Court of Appeals, in ruling in favor of Tennessee prisoner who had been sentenced to death—on his federal habeas corpus claim alleging vagueness of aggravating circumstance—held to have failed to accord deference required by 28 USCS § 2254(d) to Tennessee Supreme Court’s prior decision against prisoner.

## SUMMARY

Under a provision of 28 USCS § 2254(d), a federal court may grant a writ of habeas corpus to a state prisoner, on the basis of a claim already adjudicated by a state court, if the state-court decision was contrary to, or involved an unreasonable application of, “clearly established Federal law, as determined by the Supreme Court of the United States.”

In a Tennessee trial, an accused was (1) convicted on charges including two counts of first-degree murder, and (2) sentenced to death. This death sentence was supported by several aggravating circumstances found by the jury, including a state statutory “especially heinous, atrocious, or cruel” circumstance.

In 1984, in affirming the accused’s conviction and sentence on direct appeal, the Supreme Court of Tennessee found that the evidence supported the jury’s

finding that the murders in question were “especially heinous, atrocious, or cruel” in that, according to the court, the murders had involved torture or depravity of mind as provided in the state statute in question (665 SW2d 87).

After the accused was also unsuccessful in state-court collateral proceedings, he (1) filed a federal habeas corpus petition in the United States District Court for the Western District of Tennessee; and (2) asserted various claims, including one alleging that the “especially heinous, atrocious, or cruel” aggravating circumstance was unconstitutionally vague under the Federal Constitution’s Eighth Amendment. However, the District Court denied relief.

On appeal, the United States Court of Appeals for the Sixth Circuit initially ruled in favor of the accused on another ground (243 F3d 961, 2001 FED App 77P). However, the United States Supreme Court reversed and remanded (535 US 685, 152 L Ed 2d 914, 122 S Ct 1843).

On remand, the Court of Appeals, in again ruling in favor of the accused, expressed the view that (1) in light of a series of United States Supreme Court cases beginning in 1980, Tennessee’s “especially heinous, atrocious, or cruel” aggravating circumstance was unconstitutionally vague under the Eighth Amendment; and (2) the Tennessee Supreme Court had failed to cure any constitutional deficiencies in this regard, as according to the Court of Appeals, the Tennessee Supreme Court, in its 1984 decision, (a) had not applied, or even mentioned, any narrowing interpretation, (b) had not cited a 1981 decision in which that court had given a narrowing construction to this aggravating circumstance, and (c) instead, had “simply, but explicitly,” satisfied itself that the labels “heinous,

atrocious, or cruel," without more, applied to the accused's alleged crime (359 F3d 785, 2004 FED App 64P).

Granting certiorari, and granting a motion by the accused for leave to proceed in forma pauperis, the United States Supreme Court again reversed and remanded. In a per curiam opinion expressing the unanimous view of the court, it was held that the Court of Appeals' vagueness conclusions had failed to accord to the Tennessee Supreme Court the deference required by § 2254(d), even if, for the purposes of decision, several assumptions in favor of the accused were made—such as the assumption that the Court of Appeals had correctly concluded that the "especially heinous, atrocious, or cruel" aggravating circumstance was facially vague—as:

- (1) The Tennessee Supreme Court, in its 1984 opinion, had not been required to cite expressly that court's 1981 narrowing-construction decision.
- (2) The 1984 opinion had not disclaimed application of the Tennessee Supreme Court's established construction of the aggravating circumstance.
- (3) In such a situation, it had to be presumed that the Tennessee Supreme Court had construed the aggravating circumstance narrowly.
- (4) Even in the absence of such a presumption, it had to be concluded that the Tennessee Supreme Court had applied this narrowing construction, where that court's reasoning had closely tracked its rationale for affirming the death sentences in other cases in which that court had expressly applied a narrowing construction.
- (5) This narrowing construction was not itself unconstitutionally vague.

GINSBURG, J., joined by SOUTER and STEVENS, J.J., concurring, expressed the view that (1) once the

highest court of a state has dispository decided a point of law, it is not incumbent on that court to cite its precedential decision in every case thereafter presenting the same issue in order to demonstrate that court's adherence to the pathmarking decision; and (2) while the decision in the case at hand was based on the assumption that the Tennessee Supreme Court had adjudicated the merits of the accused's vagueness claim, there were other circumstances in which a federal court, on habeas corpus review of a state prisoner's claim, would not be warranted in assuming that a state court had considered that claim.

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MELVIN T. SMITH, Petitioner

v

MASSACHUSETTS

543 US —, 160 L Ed 2d 914, 125 S Ct 1129

[No. 03-8661]

Argued December 1, 2004.

Decided February 22, 2005.

**Decision:** Double jeopardy clause of Federal Constitution's Fifth Amendment held to prohibit Massachusetts trial judge from reconsidering initial mid-trial ruling in favor of accused on his motion for required finding of not guilty.

## SUMMARY

In the Superior Court of Suffolk County, Massachusetts, an accused and a codefendant were tried before a jury on charges arising out of a shooting. There were three charges against the accused, two alleging assault and a third alleging unlawful possession of a firearm. At the conclusion of the prosecution's case, the accused moved, under a Massachusetts rule of criminal procedure, for a required finding of not guilty on the firearm charge. At sidebar and after hearing argument from the prosecutor, the trial judge granted the motion, reasoning that there was "not a scintilla of evidence" that the accused had possessed a weapon with—as Massachusetts law then required for the offense's "firearm" element—a barrel length of less than 16 inches. The accused's motion was marked with a handwritten endorsement "Filed and after hearing, Allowed," and

the motion's allowance was entered on the docket, but the trial judge did not notify the jury of this ruling.

Later, after the defense case had proceeded and the defense had rested, the prosecutor brought to the trial judge's attention a Massachusetts precedent under which, the prosecutor contended, the alleged victim's testimony, during the prosecution's case, about the kind of gun assertedly used sufficed to establish that the barrel was shorter than 16 inches. The trial judge announced orally that she was "reversing" her previous ruling and allowing the firearm charge to go to the jury. Corresponding notations were made on the original of the accused's motion and on the docket. The jury then convicted the accused on all three charges. Subsequently, the accused received a sentence of imprisonment.

The Appeals Court of Massachusetts, in affirming, expressed the view that (1) the double jeopardy clause of the Federal Constitution's Fifth Amendment had not been violated with respect to the firearm charge, because the trial judge's "correction" of the initial ruling had not subjected the accused to a second prosecution or proceeding; and (2) the Massachusetts criminal-procedure rule had not itself precluded the trial judge from "correcting" the ruling (58 Mass App 166, 788 NE2d 977).

The Supreme Judicial Court of Massachusetts denied review (440 Mass 1104, 797 NE2d 380).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by SCALIA, J., joined by STEVENS, O'CONNOR, SOUTER, and THOMAS, JJ., it was held that the double jeopardy clause did not permit the trial judge to reconsider the initial ruling in favor of the accused on his motion for a required finding of not guilty, once the accused and his codefendant had rested their cases, as:

- (1) This initial ruling was a judgment of acquittal for purposes of the double jeopardy clause.
- (2) Submission of the firearm charge to the jury had subjected the accused to further factfinding proceedings, going to guilt or innocence, that were generally prohibited by the double jeopardy clause following an acquittal.
- (3) The case at hand did not meet the requirement, for not applying the double jeopardy bar, that the availability of reconsideration had been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.
- (4) At most, Massachusetts had made a showing, inadequate for purposes of the double jeopardy clause, that the trial judge's initial ruling was legally wrong on the basis that the prosecution's evidence was, as a matter of law, supposedly sufficient.

GINSBURG, J., joined by REHNQUIST, Ch.J., and KENNEDY and BREYER, JJ., dissenting, expressed the view that (1) the double jeopardy clause ought not to bar states from allowing trial judges to reconsider a midtrial grant of a motion to acquit on one or more, but fewer than all, counts of an indictment; (2) while, as a matter of due process rather than double jeopardy, a criminal defendant had to be accorded a timely and fully informed opportunity to meet charges, on the facts presented concerning the case at hand, the accused had suffered no prejudice fairly attributable to the trial judge's error of law in issuing the initial ruling in question; and (3) instead, the accused had been subjected to a single and unbroken trial proceeding in which he had been denied no opportunity to air his defense before presentation of the case to the jury.

**COUNSEL**

David J. Nathanson argued the cause for petitioner.  
Cathryn A. Neaves argued the cause for respondent.  
Sri Srinivasan argued the cause for the United States,  
as amicus curiae, by special leave of court.

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WILLARD STEWART, Petitioner

v

DUTRA CONSTRUCTION COMPANY

543 US —, 160 L Ed 2d 932, 125 S Ct 1118

[No. 03-814]

Argued November 1, 2004.

Decided February 22, 2005.

**Decision:** With respect to claims against owner of dredge under provisions of Jones Act (46 USCS Appx § 688(a)) and Longshore and Harbor Workers' Compensation Act (LHWCA) (33 USCS § 905(b)), dredge held to be "vessel" within use of term in LHWCA.

## SUMMARY

A construction company owned the world's then-largest dredge, a massive floating platform from which a clamshell bucket was suspended beneath the water. The bucket removed silt from the ocean floor and dumped the sediment onto one of two scows that floated alongside the dredge. Although the dredge had some characteristics common to seagoing vessels, the dredge had only limited means of self-propulsion and navigated short distances by manipulating its anchors and cables. During the dredge's use in a particular harbor construction project, the dredge typically moved in this way once every couple of hours.

The company employed a marine engineer to maintain the dredge's mechanical systems during this harbor project. At a time when the dredge was lying idle—but had not been taken out of service or perma-

nently anchored—the engineer was injured as a result of a collision between the dredge and a scow. The engineer, in bringing suit in the United States District Court for the District of Massachusetts against the company, (1) sought relief under a provision of the Jones Act (46 USCS Appx § 688(a)) on the asserted ground that he was a seaman injured by the company's negligence; and (2) filed an alternative claim under a provision of the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 USCS § 905(b)), which authorized covered employees to sue a "vessel" owner as a third party for an injury caused by the owner's negligence.

The District Court granted summary judgment to the company on the Jones Act claim. The United States Court of Appeals for the First Circuit, in affirming, concluded that the engineer was not a seaman for purposes of the Jones Act, as the dredge was not a "vessel in navigation" within the Jones Act's contemplation (230 F3d 461).

On remand, the District Court granted summary judgment to the company on the LHWCA claim. The Court of Appeals, in affirming, (1) noted that the company had conceded that the dredge was a "vessel" for purposes of § 905(b), but (2) found that the company's alleged negligence had been committed in its capacity as an employer and not as the vessel's owner (343 F3d 10).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by THOMAS, J., expressing the unanimous view of the eight participating members of the court, it was held that:

(1) The question of the engineer's status as a seaman for purposes of the Jones Act was to be determined by (a) referring to an LHWCA provision (33 USCS § 902(3)(G)) that excepted from LHWCA coverage a

member of a crew of any vessel, and (b) deciding whether the dredge in question was a "vessel" within the LHWCA's use of the term.

(2) The term "vessel" was defined throughout the LHWCA by 1 USCS § 3, under which "vessel" included every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(3) Under the § 3 definition, a dredge was a "vessel," for dredges served a waterborne transportation function.

(4) Specifically, the dredge in question was a "vessel" under § 3—notwithstanding that the dredge's primary purpose was not navigation or commerce and that the dredge was not in actual transit at the time of the engineer's injury—for (a) the dredge not only was "capable of being used" to transport equipment and workers over water, but also was actually used to transport those things during the harbor construction project; and (b) at the time of the engineer's injury, the dredge (i) was only temporarily stationary, (ii) had not been rendered practically incapable of maritime transport, and (iii) was thus engaged in maritime transportation.

REHNQUIST, Ch. J., did not participate.

## COUNSEL

David B. Kaplan argued the cause for petitioner.

Lisa S. Blatt argued the cause for the United States, as amicus curiae, by special leave of court.

Frederick E. Connelly, Jr. argued the cause for respondent.

GARRISON S. JOHNSON, Petitioner

v

CALIFORNIA et al.

543 US —, 160 L Ed 2d 949, 125 S Ct 1141

[No. 03-636]

Argued November 2, 2004.

Decided February 23, 2005.

**Decision:** Strict scrutiny held to be proper standard of review for state prisoner's Fourteenth Amendment equal-protection challenge to California's policy of racially segregating some prisoners in double cells for up to 60 days.

## SUMMARY

The California Department of Corrections (CDC) maintained an unwritten policy of racially segregating male prisoners in double cells for up to 60 days each time they entered a correctional facility as a new prisoner or a transferee. The CDC asserted that the policy was necessary to prevent violence caused by racial gangs.

An African-American prisoner who had been double-celled under the policy filed against some state officials a suit alleging that the policy violated the prisoner's right to equal protection under the Federal Constitution. After proceedings in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit (207 F3d 650), the District Court granted summary judgment for the state officials, as the court concluded that the officials were entitled to qualified immunity

against the suit. The Court of Appeals, in affirming, (1) decided that the policy's constitutionality ought to be reviewed under the deferential standard articulated by the United States Supreme Court in *Turner v Safley* (1987) 482 US 78, 96 L Ed 2d 64, 107 S Ct 2254, a case that involved restrictions on prisoners' correspondence and right to marry; and (2) concluded that the policy survived the deferential standard (321 F3d 791, reh in banc den 336 F3d 1117).

On certiorari, the Supreme Court reversed and remanded. In an opinion by O'CONNOR, J., joined by KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., it was held that strict scrutiny was the proper standard of review for the prisoner's challenge, under the equal protection clause, to the state's race-based policy, as:

- (1) The Supreme Court repeatedly had commanded that racial classifications receive close scrutiny even when they might be said to burden or benefit the races equally.
- (2) The court previously had applied a heightened standard of review in evaluating racial segregation in prisons.
- (3) Racial classifications threatened to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.
- (4) Virtually all other states and the Federal Government managed their prison systems without reliance on racial segregation.
- (5) The policy, being an express racial classification, was immediately suspect.
- (6) The deferential "reasonably related to legitimate penological interests" test was inappropriate for review of racial classifications in prisons.
- (7) Granting the state an exemption from the rule that strict scrutiny applied to all racial classifications would have undermined the court's unceasing efforts to eradicate

cate racial prejudice from the criminal justice system. (8) The necessities of prison security and discipline were a compelling government interest justifying only those uses of race that were narrowly tailored to address those necessities.

GINSBURG, J., joined by SOUTER and BREYER, JJ., concurring, (1) agreed that state-imposed racial segregation (a) was highly suspect, and (b) could not be justified on the ground that all persons suffered the separation in equal degree; but (2) expressed the view that the same standard of review ought not control judicial inspection of every official race classification.

STEVENS, J., dissenting, expressed the view that (1) a state policy of segregating prisoners by race during the first 60 days of their incarceration, as well as the first 60 days after their transfer from one facility to another, violated the equal protection clause; and (2) the court ought to have held the policy in question unconstitutional on the current record.

THOMAS, J., joined by SCALIA, J., dissenting, expressed the view that strict scrutiny was not the proper standard of review in the instant case, as (1) time and again, even when faced with constitutional rights no less "fundamental" than the right to be free from state-sponsored racial discrimination, the court had deferred to the reasonable judgments of officials experienced in running the nation's prisons; and (2) there was good reason for such deference in the instant case, for California (a) oversaw roughly 160,000 inmates, in prisons that had been a breeding ground for some of the most violent prison gangs in the nation, all of them organized along racial lines, and (b) was concerned with the safety of prisoners and saving their lives.

REHNQUIST, Ch. J., did not participate.

**COUNSEL**

Bert H. Deixler argued the cause for petitioner.

Paul D. Clement argued the cause for United States,  
as amicus curiae, by special leave of court.

Frances T. Grunder argued the cause for respon-  
dents.

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DONALD P. ROPER, SUPERINTENDENT, POTOSI  
CORRECTIONAL CENTER, Petitioner

v

CHRISTOPHER SIMMONS

543 US —, 161 L Ed 2d 1, 125 S Ct 1183

[No. 03-633]

Argued October 13, 2004.

Decided March 1, 2005.

**Decision:** Federal Constitution's Eighth Amendment proscription of cruel and unusual punishment held to prohibit imposition of death penalty for crimes committed when offenders were under age of 18 years.

## SUMMARY

In Stanford v Kentucky (1989) 492 US 361, 106 L Ed 2d 306, 109 S Ct 2969, reh den 492 US 937, 106 L Ed 2d 635, 110 S Ct 23, the United States Supreme Court held that imposition of the death penalty on offenders for murders committed at 16 and 17 years of age did not constitute cruel and unusual punishment in violation of the Federal Constitution's Eighth Amendment.

After an accused had reached the age of 18 years, he was convicted in a Missouri state court of murder, and was sentenced to death, for a homicide committed when he was aged 17. The Missouri Supreme Court affirmed (944 SW2d 165, cert den 522 US 953, 139 L Ed 2d 293, 118 S Ct 376), and the United States Court of Appeals for the Eighth Circuit denied the accused's petition for a writ of habeas corpus (235 F3d 1124, cert den 534 US 924, 151 L Ed 2d 206, 122 S Ct 280).

Subsequently, the United States Supreme Court, in Atkins v Virginia (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, held that the execution of offenders who were mentally retarded constituted cruel and unusual punishment in violation of the Eighth Amendment.

The accused filed a new petition for state postconviction relief, arguing that the reasoning of Atkins established that the Constitution prohibited execution of an offender for a crime committed when the offender was under 18. The Supreme Court of Missouri, agreeing with the accused's argument, (1) set aside the accused's death sentence, and (2) resentenced him to life imprisonment without eligibility for release (112 SW3d 397).

On certiorari, the United States Supreme Court affirmed. In an opinion by KENNEDY, J., joined by STEVENS, SOUTER, GINSBURG, and BREYER, JJ., it was held that the Eighth Amendment proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age, as:

- (1) The evidence of national consensus against the death penalty for juveniles was similar, and in some respects parallel, to the evidence held sufficient in Atkins to demonstrate a national consensus against the death penalty for offenders who were mentally retarded.
- (2) When enacting the Federal Death Penalty Act (18 USCS § 3591) in 1994, Congress had determined that the death penalty should not extend to juveniles.
- (3) As in Atkins, the objective indicia of consensus in the instant case provided sufficient evidence that society presently viewed juveniles as categorically less culpable than the average criminal.
- (4) General maturity-related differences between juveniles under 18 and adults demonstrated that juvenile

offenders could not with reliability be classified among the worst offenders.

(5) The reasoning applied by a plurality of the court concerning the immaturity of people under the age of 16 in *Thompson v Oklahoma* (1988) 487 US 815, 101 L Ed 2d 702, 108 S Ct 2687—where the court had held that the Eighth Amendment prohibited imposition of the death penalty for offenses committed when offenders were under 16—applied to all offenders under 18.

(6) Once the diminished culpability of juveniles was recognized, it was evident that the penological justifications (restitution and deterrence) for the death penalty applied to juveniles with lesser force than to adults.

(7) The age of 18 was the point where, for many purposes, society drew the line between childhood and adulthood.

(8) The United States was the only country in the world that continued to give official sanction to the juvenile death penalty.

STEVENS, J., joined by GINSBURG, J., concurring, expressed the view that perhaps even more important than the Supreme Court's specific holding was the court's reaffirmation of the basic principle that evolving standards of decency informed the court's interpretation of the Eighth Amendment.

O'CONNOR, J., dissenting, expressed the view that (1) the court's decision was not justified by (a) the objective evidence of contemporary societal values, (b) the court's moral proportionality analysis, or (c) the two in tandem; (2) the evidence before the court failed to demonstrate conclusively that any national consensus against capital punishment of 17-year-old offenders had emerged in the brief period since the court had upheld the constitutionality of this practice in *Stanford*; (3) the

court had adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures that at least some 17-year-old murderers were sufficiently mature to deserve the death penalty in an appropriate case; and (4) it had not been shown that capital sentencing juries were incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

SCALIA, J., joined by REHNQUIST, Ch. J., and THOMAS, J., dissenting, expressed the view that (1) the court had (a) proclaimed itself sole arbiter of the nation's moral standards, and (b) in the course of discharging that responsibility, had purported to take guidance from the views of foreign courts and legislatures; and (2) the meaning of the Eighth Amendment, no more than the meaning of other provisions of the Constitution, ought not to be determined by the subjective views of (a) five members of the Supreme Court, and (b) like-minded foreigners.

#### **COUNSEL**

James R. Layton argued the cause for petitioner.  
Seth P. Waxman argued the cause for respondent.

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CHEROKEE NATION OF OKLAHOMA AND  
SHOSHONE-PAIUTE TRIBES OF THE DUCK VAL-  
LEY RESERVATION, Petitioners

v

MICHAEL O. LEAVITT, SECRETARY OF HEALTH  
AND HUMAN SERVICES, et al. (No. 02-1472)

MICHAEL O. LEAVITT, SECRETARY OF HEALTH  
AND HUMAN SERVICES, Petitioner

v

CHEROKEE NATION OF OKLAHOMA (No. 03-853)

543 US —, 161 L Ed 2d 66, 125 S Ct 1172

Argued November 9, 2004.

Decided March 1, 2005.

**Decision:** Federal Government's promises to pay Indian tribes' costs incurred in administering health services contracts under Indian Self-Determination and Education Assistance Act (25 USCS §§ 450 et seq.) held legally binding.

## SUMMARY

The Indian Self-Determination and Education Assistance Act (ISDEAA) (25 USCS §§ 450 et seq.) authorized the Federal Government and Indian tribes to enter into contracts in which the tribes promised to supply some federally funded services that a government agency would otherwise provide. A provision of the ISDEAA (25 USCS § 450j-1(a)(2)) specified that the government had to pay a tribe's "contract support costs," which included some indirect administrative costs.

Pursuant to the ISDEAA, two Indian tribes contracted with the government to supply health services normally provided by the Department of Health and Human Services' Indian Health Service. Each contract included an "Annual Funding Agreement" with a government promise to pay contract support costs. However, in each instance the government refused to pay the full amount promised, on the asserted ground that Congress had not appropriated sufficient funds.

After payment claims with respect to contracts for fiscal years 1996 and 1997 were denied by the Department of the Interior in administrative proceedings, the tribes brought a breach-of-contract action in the Federal District Court for the Eastern District of Oklahoma, which granted summary judgment to the government (190 F Supp 2d 1248). The United States Court of Appeals for the Tenth Circuit affirmed (311 F3d 1054).

In a separate case involving payment claims by one of the tribes for fiscal years 1994, 1995, and 1996, the Interior Department's Board of Contract Appeals ruled that the Secretary of Health and Human Services had breached the contracts in question by failing to pay the tribe's full indirect costs, and the United States Court of Appeals for the Federal Circuit affirmed (334 F3d 1075).

On certiorari, the United States Supreme Court—having consolidated the two cases—(1) affirmed the judgment of the Court of Appeals for the Federal Circuit, (2) reversed the judgment of the Court of Appeals for the Tenth Circuit, and (3) remanded both cases. In an opinion by BREYER, J., joined by STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., it was held that the Federal Government's promises to pay the contract support costs in question were legally binding, for:

(1) The ISDEAA's language strongly suggested that Congress, in respect to the binding nature of a promise, meant to treat alike promises made under the ISDEAA and ordinary contractual promises.

(2) The ISDEAA's general purposes did not support any special treatment of promises made under the ISDEAA.

(3) The government's position was not helped by ISDEAA provisions that (a) tribes need not spend funds in excess of the amount of funds awarded (25 USCS § 450l(c)), and (b) no self-determination contract was to be construed to be a procurement contract (25 USCS § 450b(j)).

(4) There was no indication that Congress believed that, because of mutual self-awareness among tribal contractors, tribes—and not the government—ought to bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay all such contractors.

(5) The government's promises were not rendered nonbinding by a proviso (25 USCS § 450j-1(b)) under which (a) the provision of funds was "subject to the availability of appropriations," and (b) the Secretary of the Interior was not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization.

(6) A clause in a 1999 appropriations act (112 Stat 2681-288)—to the effect that the amounts appropriated to or earmarked in committee reports for the Indian Health Service for payments to tribes for contract support costs were the total amounts available for such purposes for fiscal years 1994 through 1998—was to be interpreted as simply forbidding the Service to use unspent funds appropriated in prior years to pay unpaid contract support costs.

SCALIA, J., concurring in part, joined the court's opinion except insofar as that opinion relied on a Senate committee report to establish the meaning of the statute at issue.

REHNQUIST, Ch. J., did not participate.

### COUNSEL

Lloyd B. Miller argued the cause for petitioners in No. 02-1472 and for respondent in No. 03-853.

Sri Srinivasan argued the cause for petitioner in No. 03-853 and for respondent in No. 02-1472.

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GEORGE J. TENET, INDIVIDUALLY, PORTER J.  
GOSS, DIRECTOR OF CENTRAL INTELLIGENCE  
AND DIRECTOR OF THE CENTRAL INTELLI-  
GENCE AGENCY, AND UNITED STATES, Petitioners

v

JOHN DOE, et ux.

544 US —, 161 L Ed 2d 82, 125 S Ct 1230

[No. 03-1395]

Argued January 11, 2005.

Decided March 2, 2005.

**Decision:** Public policy held to prohibit suit against United States and CIA Director by married couple, asserting estoppel and due process claims based on CIA's alleged failure to provide couple with financial assistance allegedly promised in exchange for asserted espionage services.

## SUMMARY

In *Totten v United States* (1876) 92 US 105, 23 L Ed 605, the United States Supreme Court held that public policy forbade an asserted Civil War spy from suing the United States to enforce its obligations under a purported secret espionage agreement.

A married couple filed against the United States and the Director of the Central Intelligence Agency (CIA) a suit asserting, among other claims, that the CIA had violated the couple's due process rights by failing to provide the couple with financial assistance that the CIA had promised in return for the couple's espionage services during the Cold War. The United States District Court for the Western District of Washington (1)

dismissed some of the couple's claims; (2) denied the government's motion to dismiss on the basis of Totten; and (3) ruled that the due process claims could proceed (99 F Supp 2d 1284).

After the government renewed its motion to dismiss and moved for summary judgment on the due process claims, the District Court, apparently construing the couple's complaint as also raising an estoppel claim, (1) denied the government's motions; (2) ruled again that Totten did not bar the couple's claims; and (3) found that a trial was warranted on the due process and estoppel claims.

On interlocutory appeal, a panel of the United States Court of Appeals for the Ninth Circuit affirmed in relevant part (329 F3d 1135). Subsequently, the Court of Appeals denied a petition for rehearing en banc (353 F3d 1141).

On certiorari, the Supreme Court reversed. In an opinion by REHNQUIST, Ch. J., expressing the unanimous view of the court, it was held that Totten prohibited the couple's suit, as:

- (1) Totten prohibited the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regarded as confidential.
- (2) Totten precluded judicial review in cases, such as the case at hand, in which success depended on the existence of the claimants' secret espionage relationship with the government.
- (3) Two Supreme Court cases decided after Totten had confirmed that Totten's broad holding—that suits premised on alleged espionage agreements were altogether forbidden—continued to be valid.
- (4) The government's evidentiary privilege against being required to reveal state secrets, and the use of in-chambers judicial proceedings, could not provide

the necessary and absolute protection provided by Totten.

(5) Forcing the government to litigate the types of claims in question would have made the government vulnerable to "graymail."

(6) Requiring the government to invoke its privilege on a case-by-case basis would have risked the perception that the government was either confirming or denying relationships with individual plaintiffs.

STEVENS, J., joined by GINSBURG, J., concurring, expressed the view that the doctrine of stare decisis provided a sufficient justification for concluding that the couple's complaint was without merit.

SCALIA, J., concurring, expressed the view that (1) as applied in the instant case, the bar of Totten was a jurisdictional one; and (2) even if it were not, given the squarely applicable precedent of Totten, the absence of a cause of action was so clear that the couple's claims were frivolous, thus establishing another jurisdictional ground for dismissal.

## COUNSEL

Paul D. Clement argued the cause for petitioners.  
David J. Burman argued the cause for respondents.

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REGINALD SHEPARD, Petitioner

v

UNITED STATES

544 US —, 161 L Ed 2d 205, 125 S Ct 1254

[No. 03-9168]

Argued November 8, 2004.

Decided March 7, 2005.

**Decision:** Sentencing court, in inquiring under Armed Career Criminal Act (18 USCS § 924(e)) as to whether accused previously pleaded guilty to “generic burglary,” held not permitted to look to police reports or complaint applications.

## SUMMARY

The Armed Career Criminal Act (ACCA) (18 USCS § 924(e)) provided a sentence enhancement for an accused who (1) was convicted, under 18 USCS § 922(g), of unlawful possession of a firearm, and (2) had three prior convictions for violent felonies such as burglary. In *Taylor v United States* (1990) 495 US 575, 109 L Ed 2d 607, 110 S Ct 2143, the United States Supreme Court held that (1) the ACCA made burglary a violent felony with respect to only “generic burglary,” that is, burglary committed in a building or enclosed space and not in a boat or motor vehicle; and (2) a court sentencing under the ACCA could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary.

After an accused pleaded guilty in the United States District Court for the District of Massachusetts to a

violation of 18 USCS § 922(g)(1), the Federal Government sought to increase his sentence pursuant to the ACCA, on the ground that the accused had had four prior convictions entered upon guilty pleas under a Massachusetts burglary statute. The government urged the District Court to examine some police reports as a way of telling whether the accused's prior guilty pleas went to "generic burglaries," notwithstanding that the complaints in question had tracked the more expansive definition of burglary in Massachusetts law, which definition encompassed unlawful entries into buildings, vehicles, or vessels. The District Court, although sentencing the accused somewhat above the standard level under the Federal Sentencing Guidelines (18 USCS Appx), (1) refused to consider the police reports, and (2) rejected the government's request for an enhancement under the ACCA (125 F Supp 2d 562).

The United States Court of Appeals for the First Circuit, in vacating the sentence and remanding the case, concluded that police reports and complaint applications could count as sufficiently reliable evidence for determining whether a guilty plea constituted an admission to a generically violent crime for purposes of the ACCA (231 F3d 56). On remand, however, the District Court—noting that the accused had denied that the police reports had been part of the plea process—ordered the original sentence to be reimposed (181 F Supp 2d 14). The Court of Appeals, in once again vacating and ordering a remand, observed that the accused had never seriously disputed that he had in fact broken into buildings as described in the police reports or complaint applications at issue (348 F3d 308).

On certiorari, the Supreme Court reversed and remanded. In that part of an opinion by SOUTER, J., which constituted the opinion of the court and was joined by

STEVENS, SCALIA, GINSBURG, and THOMAS, JJ., it was held that for purposes of the ACCA:

(1) A sentencing court was not permitted to look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary.

(2) The sentencing court's inquiry to determine whether a plea of guilty to burglary defined by a nongeneric—that is, more expansive—statute necessarily admitted elements of the generic offense was generally limited to examining (a) the statutory definition of the offense in question, (b) the charging document, (c) a written plea agreement, (d) the transcript of a colloquy between the trial judge and the accused in which the factual basis for the plea was confirmed by the accused, and (e) any explicit factual finding by the trial judge to which the accused assented.

In addition, SOUTER, J., joined by STEVENS, SCALIA, and GINSBURG, JJ., expressed the view that the rule of reading statutes to avoid serious risks of federal unconstitutionality counseled limiting the scope of judicial factfinding on the disputed generic character of a prior guilty plea.

THOMAS, J., concurring in part and concurring in the judgment, expressed the view (1) the Supreme Court had correctly declined to broaden the scope of the evidence that judges could consider under *Taylor v United States*, but (2) permitting ACCA sentencing courts to look beyond charging papers, jury instructions, and plea agreements to an assortment of other documents such as complaint applications and police reports would have given rise to federal constitutional error, not constitutional doubt.

O'CONNOR, J., joined by KENNEDY and BREYER, JJ., dissenting, expressed the view that (1) the Court of

Appeals had properly established the applicability of the ACCA sentence by looking to the complaint applications and police reports from the accused's prior convictions; and (2) the list of sources that a sentencing judge was permitted to consult under the ACCA ought to have been expanded to include any uncontradicted and internally consistent parts of the record from an earlier conviction.

REHNQUIST, Ch. J., did not participate.

### **COUNSEL**

Linda J. Thompson argued the cause for petitioner.  
John P. Elwood argued the cause for respondent.

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CLAUDE M. BALLARD, et ux., Petitioners  
v  
COMMISSIONER OF INTERNAL REVENUE (No.  
03-184)

ESTATE OF BURTON W. KANTER, DECEASED, et  
al., Petitioners  
v  
COMMISSIONER OF INTERNAL REVENUE (No.  
03-1034)

544 US —, 161 L Ed 2d 227, 125 S Ct 1270

Argued December 7, 2004.  
Decided March 7, 2005.

**Decision:** United States Tax Court held not authorized to exclude, from record on appeal, reports—which included findings of fact and opinion—submitted to court by special trial judges pursuant to Tax Court Rule 183(b).

## SUMMARY

Under 26 USCS § 7443A, (1) the United States Tax Court's Chief Judge appointed auxiliary officers known as special trial judges to hear certain cases; but (2) ultimate decision, when tax deficiencies exceeded \$50,000, was reserved for the Tax Court. Tax Court Rule 183, which was enacted in 1983, and which governed the proceedings in which a special trial judge heard a case but the court rendered the final decision, provided (1) in Rule 183(b), that after trial and submission of briefs, the special trial judge was required to submit a report, including findings of fact and opinion,

to the Chief Judge, who would assign the case to a Tax Court judge; and (2) in Rule 183(c), that the assigned Tax Court judge (a) was required to (i) give due regard to the circumstance that the special trial judge had had the opportunity to evaluate the credibility of the witnesses, and (ii) presume that the factfindings contained in the special trial judge's report were correct, and (b) could adopt, modify, or reject the report in whole or in part.

In Rule 183, the Tax Court had eliminated a predecessor rule's provision for service of copies of the special trial judge's report to the parties and had also eliminated the predecessor rule's procedure permitting the parties to file exceptions to the report. After Rule 183 was enacted, the court started a practice under which (1) in all cases, the Tax Court judge issued a decision stating that the court agreed with and adopted the special trial judge's opinion; (2) the extent to which the Tax Court had modified or rejected the special trial judge's findings and opinion was undisclosed; and (3) unlike under the court's practice under the predecessor rule, the special trial judge's report was (a) withheld from the public, and (b) excluded from the appellate record.

Taxpayers in three federal judicial circuits who had received notices of deficiency from the Commissioner of Internal Revenue—charging the taxpayers with failure to report certain payments on their individual tax returns and with tax fraud—filed petitions for redetermination in the Tax Court. The Chief Judge assigned the consolidated case to a special trial judge who, after trial, submitted a Rule 183(b) report to the Chief Judge, who then issued an order assigning the case to a Tax Court judge for review of the report, and if approved, for adoption.

The Tax Court judge issued the Tax Court's decision, holding the taxpayers liable for underpaid taxes and for fraud penalties. That decision, which included a document labeled "Opinion of the Special Trial Judge," stated "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below."

On appeals by two groups of the taxpayers, the United States Court of Appeals for the Seventh Circuit (337 F3d 833) and the Court of Appeals for the Eleventh Circuit (321 F3d 1037) (1) rejected the taxpayers' requests that the special trial judge's report be made available to the taxpayers or be placed under seal in the record on appeal, and (2) affirmed in principal part the Tax Court's decision that the taxpayers were liable for unpaid taxes and for fraud penalties.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by GINSBURG, J., joined by STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., it was held that the Tax Court was not authorized to exclude, from the record on appeal, reports submitted to the Tax Court by special trial judges pursuant to Rule 183(b), as (1) no statute authorized, and the current text of Rule 183 did not warrant, the concealment at issue; (2) it was routine in federal judicial and administrative decisionmaking both to (a) disclose the initial report of a hearing officer, and (b) make that report part of the record available to an appellate forum; and (3) a departure of the bold character practiced by the Tax Court—the creation and attribution solely to the special trial judge of a superseding report composed in unrevealed collaboration with a regular Tax Court judge—demanded at the very least, full and fair statement in the Tax Court's own rules.

KENNEDY, J., joined by SCALIA, J., concurring, expressed the view that (1) the Supreme Court was correct in holding that (a) Rule 183(c) mandated that deference was due to factfindings made by the special trial judge, and (b) it was the Rule 183(b) report that Rule 183(c) instructed the Tax Court to review and adopt, modify, or reject; (2) a reasonable reading of Rule 183 required litigants and the Courts of Appeals to be able to evaluate any changes made to the findings of fact in the special trial judge's initial report; and (3) including the original findings of fact in the record on appeal would make that possible.

REHNQUIST, Ch. J., joined by THOMAS, J., dissenting, expressed the view that the Supreme Court (1) hinged its decision on an argument—that Rule 183 did not authorize the practice that the Tax Court had been following—that had not been presented by the taxpayers for the Supreme Court's consideration; and (2) ought to defer to the Tax Court's interpretation of its compliance with its own rules, which interpretation, in this instance, was reasonable.

## COUNSEL

Steven M. Shapiro argued the cause for petitioners in No. 03-184 and No. 03-1034.

Thomas G. Hungar argued the cause for respondent in No. 03-184 and No. 03-1034.

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REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, et al., Petitioners

v

WILLIAM DWIGHT DOTSON, et al.

544 US —, 161 L Ed 2d 253, 125 S Ct 1242

[No. 03-287]

Argued December 6, 2004.

Decided March 7, 2005.

**Decision:** Two Ohio prisoners, in challenging state's parole procedures, held permitted to bring actions under 42 USCS § 1983, rather than instead being required to seek relief exclusively under federal habeas corpus statutes (such as 28 USCS § 2254).

## SUMMARY

In *Preiser v Rodriguez* (1973) 411 US 475, 36 L Ed 2d 439, 93 S Ct 1827, the United States Supreme Court held that in view of the federal habeas corpus statutes (such as 28 USCS § 2254), and as an implied exception to the coverage of 42 USCS § 1983, a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of the prisoner's confinement, but must seek federal habeas corpus relief (or appropriate state relief) instead. Several subsequent Supreme Court decisions developed various aspects of this subject.

In each of two cases, an Ohio prisoner who was serving a lengthy prison term (1) filed a § 1983 action in the United States District Court for the Northern District of Ohio; (2) claimed that the state's parole procedures violated the Federal Constitution; and (3)

sought declaratory and injunctive relief that would render invalid the state procedures used to deny (a) parole eligibility (the first prisoner), or (b) parole suitability (the second prisoner). However, in each case, the District Court concluded that a § 1983 action did not lie and that the prisoner would have to seek relief through a federal habeas corpus suit.

On appeal, the United States Court of Appeals for the Sixth Circuit—having consolidated the two cases—reversed, as the Court of Appeals found that the two prisoners' actions could properly proceed under § 1983 (329 F3d 463, 2003 FED App 147P).

On certiorari, the Supreme Court affirmed and remanded. In an opinion by BREYER, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., it was held that the two prisoners in question were permitted to bring § 1983 actions, rather than instead being required to seek relief exclusively under the federal habeas corpus statutes, as:

- (1) Neither prisoner sought an injunction ordering the prisoner's immediate or speedier release into the community.
- (2) A favorable judgment would not necessarily imply the invalidity of the prisoners' convictions or sentences.
- (3) With respect to an objection by the state on the basis of asserted principles of federal/state comity, there was no reason to move the line drawn by earlier Supreme Court cases.

SCALIA, J., joined by THOMAS, J., concurring, expressed the view that (1) the Supreme Court's opinion read two of the court's precedents correctly; and (2) a contrary holding would have required the Supreme Court to broaden the scope of federal habeas corpus relief beyond recognition.

KENNEDY, J., dissenting, expressed the view that with respect to § 1983 and federal habeas corpus, the Supreme Court's decision (1) treated sentencing proceedings and parole proceedings inconsistently, in a manner that was (a) difficult to justify, and (b) in tension with the court's precedents; and (2) allowed state prisoners raising parole challenges to circumvent the state courts, thus depriving the federal courts of the invaluable assistance and frontline expertise found in the state courts.

### COUNSEL

Douglas R. Cole argued the cause for petitioners.

John Q. Lewis argued the cause for respondent Rogerico Johnson.

Alan E. Untereiner argued the cause for respondent William D. Dotson.

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DARIN L. MUEHLER, et al., Petitioners

v

IRIS MENA

544 US —, 161 L Ed 2d 299, 125 S Ct 1465

[No. 03-1423]

Argued December 8, 2004.

Decided March 22, 2005.

**Decision:** Fourth Amendment held not violated by (1) detention in handcuffs of house's occupant during entire warrant-authorized search of house; or (2) questioning of occupant during detention about her immigration status.

## SUMMARY

Some police officers in California—who, as a result of an investigation of a gang-related driveby shooting, believed that at least one gang member (1) resided in a particular house, and (2) was armed and dangerous—obtained a warrant that authorized a broad search of the house for deadly weapons and evidence of gang membership. The police officers, understanding that the gang was composed primarily of illegal immigrants, notified the United States Immigration and Naturalization Service (INS) of the intended search. An INS officer accompanied the police officers during the search.

During the 2-to-3 hour duration of the search, occupants of the house (1) remained in handcuffs in the house's garage, (2) were guarded by one or two officers, and (3) were allowed to move around the garage. Also during this detention, (1) an officer asked for each

occupant's name, date of birth, place of birth, and immigration status; and (2) the INS officer asked the detainees for their immigration documentation.

One occupant, whose documentation had confirmed her permanent-resident status, brought against at least two of the officers under 42 USCS § 1983 a suit alleging that she had been detained for an unreasonable time and in an unreasonable manner in violation of the Federal Constitution's Fourth Amendment. The United States District Court for the Central District of California denied the officers' motion for summary judgment, and the United States Court of Appeals for the Ninth Circuit affirmed in pertinent part and remanded (226 F3d 1031).

A jury found that two officers had violated the occupant's Fourth Amendment rights. The Court of Appeals, affirming, held that the occupant's Fourth Amendment rights had been violated by her having been (1) confined in the garage and kept in handcuffs during the search, and (2) questioned about her immigration status (332 F3d 1255, reh in banc den 354 F3d 1015).

On certiorari, the Supreme Court vacated and remanded. In an opinion by REHNQUIST, Ch. J., joined by O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., it was held that:

(1) The officers' detention, during the entire 2-to-3 hour search of the house, of the occupant in handcuffs did not violate the Fourth Amendment prohibition of unreasonable seizures, as the detention was permissible under *Michigan v Summers* (1981) 452 US 692, 69 L Ed 2d 340, 101 S Ct 2587, in which the Supreme Court had held that officers executing a search warrant for contraband had the authority to detain the occupants of the premises while a proper search was conducted.

(2) The officers' questioning of the occupant, during

the detention, about her immigration status did not constitute an independent Fourth Amendment violation, as (a) the Supreme Court had held repeatedly that mere police questioning did not constitute a seizure; and (b) the Court of Appeals had not held that the detention had been prolonged by the questioning.

KENNEDY, J., concurring, said that (1) it was a matter of first concern that excessive force not be used on persons who, although lawfully detained under Michigan v Summers, were not themselves suspected of any involvement in criminal activity; (2) the use of handcuffs was the use of force; and (3) such force ought to be objectively reasonable under the circumstances.

STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., concurring in the judgment, expressed the view that (1) the jury properly could have found that the officers had used excessive force in keeping the occupant in handcuffs for up to 3 hours; and (2) on remand, the Court of Appeals ought to have been instructed to consider whether the evidence supported the occupant's contention that the officers had used excessive force in detaining her.

## COUNSEL

Carter G. Phillips argued the cause for petitioners.

Kannon K. Shanmugam argued the cause for the United States, as amicus curiae, by special leave of court.

Paul L. Hoffman argued the cause for respondent.

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CITY OF RANCHO PALOS VERDES, CALIFORNIA,  
et al., Petitioners

v

MARK J. ABRAMS

544 US —, 161 L Ed 2d 316, 125 S Ct 1453

[No. 03-1601]

Argued January 19, 2005.

Decided March 22, 2005.

**Decision:** Individual held unable to enforce, through action under 42 USCS § 1983, limitations on local zoning authority (concerning wireless-communications facilities) that were set forth in Telecommunications Act of 1996 provision (47 USCS § 332(c)(7)).

## SUMMARY

A Telecommunications Act of 1996 (TCA) provision (47 USCS § 332(c)(7)) generally limited local zoning authority concerning wireless-communications facilities. Moreover, a judicial remedy was expressly authorized by 47 USCS § 332(c)(7)(B)(v), which included requirements that (1) judicial review of zoning decisions under § 332(c)(7)(B)(v) had to be sought within 30 days after a governmental entity had taken final action; and (2) once such a suit was filed, a court had to hear and decide the suit on an expedited basis. Also, there was a “saving clause” in § 601(c)(1) of the TCA (note following 47 USCS § 152), to the effect that the TCA would not be construed to modify, impair, or supersede federal, state, or local law unless expressly so provided in the TCA.

An individual's home was located on some high-elevation property in a California city. In 1989, the individual obtained a permit from the city to construct an antenna on his property for amateur use. Subsequently, the individual (1) placed several smaller antennas on the property without prior permission from the city, and (2) used the antennas for both noncommercial and commercial purposes. However, a city ordinance required a conditional-use permit from a city commission for commercial antenna use. After a state court enjoined the individual from using the antennas for a commercial purpose, the individual, in July 1999, applied to the commission for the requisite conditional-use permit. However, the commission denied the application, and the city council denied the individual's appeal.

The individual then (1) filed an action against the city in the United States District Court for the Central District of California; (2) included an allegation that the denial of the conditional-use permit violated the limitations placed on the city's zoning authority by § 332(c)(7); and (3) sought (a) injunctive relief under § 332(c)(7)(B)(v), and (b) money damages and attorneys' fees under 42 USCS §§ 1983 and 1988. The District Court concluded that the city's denial of a conditional-use permit was not supported by substantial evidence. Subsequently, the District Court (1) held that § 332(c)(7)(B)(v) provided the exclusive remedy for the city's actions; and (2) ordered the city to grant the individual's application for a conditional-use permit; but (3) refused the individual's request for damages under § 1983.

On appeal, the United States Court of Appeals for the Ninth Circuit, in reversing in pertinent part and in ordering a remand, expressed the view that with respect to the individual's action, (1) the TCA's language did

not expressly foreclose § 1983 remedies; and (2) the TCA did not contain a comprehensive remedial scheme that would impliedly foreclose § 1983 remedies (354 F3d 1094).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., it was held that the individual could not properly enforce, through a § 1983 action, the limitations on local zoning authority that were set forth in § 332(c)(7), for—even if it were assumed for the purposes of argument that § 332(c)(7) created individually enforceable rights—Congress did not intend the judicial remedy expressly authorized by § 332(c)(7)(B)(v) to coexist with an alternative remedy available in a § 1983 action, as:

- (1) Enforcement of § 332(c)(7) through § 1983 would distort the scheme of expedited judicial review and limited remedies created in § 332(c)(7).
- (2) A congressional intent not to preclude a § 1983 action was not shown by the TCA's saving clause.

BREYER, J., joined by O'CONNOR, SOUTER, and GINSBURG, JJ., concurring, expressed the view that (1) the Supreme Court's opinion correctly provided general guidance in the form of an ordinary inference that when Congress creates a specific judicial remedy, Congress does so to the exclusion of § 1983; and (2) for reasons of § 332(c)(7)'s context, and for the reasons set forth by the Supreme Court, Congress intended that § 332(c)(7)'s judicial remedy would (a) be an exclusive remedy, and (b) foreclose—not supplement—§ 1983 relief.

STEVENS, J., concurring in the judgment, expressed the view that (1) in the case at hand, the TCA's text,

structure, and history provided convincing evidence that Congress intended § 332(c)(7) to operate as a comprehensive and exclusive remedial scheme; but (2) the Supreme Court's opinion (a) did not properly acknowledge the strength of the normal presumption that Congress intended to preserve, rather than to preclude, the availability of § 1983 as a remedy for the enforcement of federal statutory rights, and (b) incorrectly assumed that the TCA's legislative history was totally irrelevant.

## COUNSEL

Jeffrey A. Lamken argued the cause for petitioners.

James A. Feldman argued the cause for the United States, as amicus curiae, by special leave of court.

Seth P. Waxman argued the cause for respondent.

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JILL L. BROWN, WARDEN, Petitioner

v

WILLIAM CHARLES PAYTON

544 US —, 161 L Ed 2d 334, 125 S Ct 1432

[No. 03-1039]

Argued November 10, 2004.

Decided March 22, 2005.

**Decision:** Federal Court of Appeals' decision affirming grant of federal habeas corpus relief to state prisoner, on ground that jury instructions had not permitted consideration of prisoner's postcrime religious conversion, held contrary to limits on habeas review imposed by 28 USCS § 2254(d).

## SUMMARY

After the guilt phase of a trial in the Superior Court of Orange County, California, a defendant was convicted of murder and other crimes. During the trial's penalty phase, several witnesses testified that in the 1 year and 9 months that the defendant had spent in prison since his arrest, he had (1) undergone a religious conversion, (2) participated in prison Bible study classes and a prison ministry, and (3) had a calming effect on other prisoners.

The trial judge gave the jury a catchall "factor (k)" instruction—as set forth in a California statute then in force—directing the jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The prosecutor's closing argument included statements that (1) factor (k) did not allow the jury to consider

anything that had happened after the crime; and (2) the circumstances of the case outweighed the mitigating effect of the defendant's religious conversion. When the defense objected to this argument, the trial judge (1) admonished the jury that the prosecutor's comments were merely argument, but (2) did not explicitly instruct that the prosecutor's interpretation of factor (k) was incorrect. The jury returned a verdict recommending a death sentence, and the judge sentenced the defendant to death.

On direct appeal to the Supreme Court of California, the defendant argued that the jury incorrectly had been led to believe that the jury could not consider the mitigating evidence of his postconviction conduct, in violation of the Federal Constitution's Eighth Amendment. However, the California Supreme Court, in affirming the convictions and sentence, reasoned that a United States Supreme Court decision involving a factor (k) instruction—*Boyd v California* (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190—had established that the text of factor (k) was broad enough to accommodate the postcrime mitigating evidence presented by the defendant in the case at hand (3 Cal 4th 1050, 839 P2d 1035, cert den 510 US 1040, 126 L Ed 2d 649, 114 S Ct 682).

The United States District Court for the Central District of California granted the defendant's petition for a writ of habeas corpus. A panel of the United States Court of Appeals for the Ninth Circuit reversed in pertinent part, but after rehearing in banc, the Court of Appeals affirmed the District Court's order granting habeas corpus relief (299 F3d 815).

The United States Supreme Court granted certiorari, vacated the Court of Appeals' judgment, and remanded the case for reconsideration under the deferential review standard of an Antiterrorism and Effective

Death Penalty Act of 1996 provision (28 USCS § 2254(d)(1)), under which a state prisoner's application to a federal court for a writ of habeas corpus was not to be granted with respect to any claim that had been adjudicated on the merits in state court proceedings unless the adjudication of the claim had resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court (538 US 975, 155 L Ed 2d 662, 123 S Ct 1785).

On remand, the Court of Appeals once again affirmed the District Court's grant of habeas corpus relief, on the ground that (1) the factor (k) instruction was likely to have misled the jury under the circumstances presented, and (2) it was an unreasonable application of the United States Supreme Court's cases for the California Supreme Court to have concluded otherwise (346 F3d 1204).

On certiorari, the United States Supreme Court reversed. In an opinion by KENNEDY, J., joined by O'CONNOR, SCALIA, THOMAS, and BREYER, JJ., it was held that the Court of Appeals' decision was contrary to the limits on federal habeas corpus review imposed by § 2254(d), for:

- (1) The California Supreme Court had not acted unreasonably in reading *Boyd v California* as establishing that the text of factor (k) was broad enough to accommodate the defendant's postcrime mitigating evidence.
- (2) Even on the assumption that the California Supreme Court had incorrectly concluded that the prosecutor's argument and remarks about factor (k) had not misled the jury, this conclusion was not unreasonable.

SCALIA, J., joined by THOMAS, J., concurring, (1) agreed that the California Supreme Court's decision  
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was not “contrary to” or “an unreasonable application of” the United States Supreme Court’s cases; and (2) expressed the view that limiting a jury’s discretion to consider all mitigating evidence did not violate the Eighth Amendment.

BREYER, J., concurring, expressed the view that (1) in a death-penalty case, the Federal Constitution required sentencing juries to consider all mitigating evidence; and (2) one could have concluded that the jury in the case at hand might have thought that factor (k) barred consideration of the mitigating evidence in question, but (3) it could not be said that the California Supreme Court’s decision failed the deferential test of § 2254(d).

SOUTER, J., joined by STEVENS and GINSBURG, JJ., dissenting, expressed the view that (1) it was reasonably likely that the jury had failed to consider the mitigating evidence in question; and (2) the California Supreme Court, in concluding otherwise, had unreasonably applied settled law, with substantially injurious effect.

REHNQUIST, Ch. J., did not participate.

## COUNSEL

Andrea N. Cortina argued the cause for petitioner.  
Dean R. Gits argued the cause for respondent.

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RODERICK JACKSON, Petitioner

v

BIRMINGHAM BOARD OF EDUCATION

544 US —, 161 L Ed 2d 361, 125 S Ct 1497

[No. 02-1672]

Argued November 30, 2004.

Decided March 29, 2005.

**Decision:** Private right of action implied by Title IX (20 USCS §§ 1681 et seq.) for victims of sex discrimination by recipients of federal education funds held to encompass claims of retaliation for complaining about sex discrimination.

## SUMMARY

After a girls' basketball coach at a public high school complained unsuccessfully to his supervisor that the team was not receiving equal funding and equal access to athletic equipment and facilities, the coach began to receive negative work evaluations and ultimately was removed as the girls' coach. He brought against the local board of education a suit alleging that (1) the board had retaliated against him because he had complained about sex discrimination against the girls' team, and (2) such retaliation violated Title IX of the Education Amendments of 1972 (20 USCS §§ 1681 et seq.), which, in 20 USCS § 1681(a), required that no person "on the basis of sex" be "subjected to discrimination under any education program or activity receiving Federal financial assistance."

The United States District Court for the Northern District of Alabama dismissed the complaint on the

ground that Title IX's private cause of action did not include claims of retaliation (2002 US Dist LEXIS 27597). The United States Court of Appeals for the Eleventh Circuit, affirming, held that (1) Title IX did not provide a private right of action for retaliation, and (2) even if Title IX prohibited retaliation, the coach would not have been entitled to relief, as he was not within the class of persons protected by the statute (309 F3d 1333).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by O'CONNOR, J., joined by STEVENS, SOUTER, GINSBURG, and BREYER, JJ., it was held that the private right of action implied by Title IX encompassed claims of retaliation for complaining about sex discrimination, as:

- (1) Such retaliation was (a) by definition, an intentional act; (b) a form of "discrimination;" and (c) "on the basis of sex."
- (2) The Supreme Court repeatedly had construed "discrimination" under Title IX broadly.
- (3) By using in Title IX the broad term "discrimination," Congress had given the statute a broad reach.
- (4) *Sullivan v Little Hunting Park, Inc.* (1969) 396 US 229, 24 L Ed 2d 386, 90 S Ct 400—which, 3 years before enactment of Title IX, had interpreted 42 USCS § 1982's general prohibition of racism against non-whites concerning property rights to cover retaliation against a white lessee for advocating the rights of a black lessor—provided a valuable context for understanding Title IX.
- (5) A person unfairly treated in response to complaining about an alleged violation of Title IX was a victim of discriminatory retaliation regardless of whether the complainant was the subject of the original complaint.

THOMAS, J., joined by REHNQUIST, Ch. J., and SCALIA and KENNEDY, JJ., dissenting, expressed the view that the

court's holding that the private right of action implied by Title IX extended to claims of retaliation was contrary to the statute's plain terms, as (1) retaliatory conduct was not discrimination on the basis of sex; and (2) Title IX did not (a) speak unambiguously in imposing conditions on funding recipients through Congress' spending power, or (b) evince a plain congressional intent to provide a private right of action for retaliation.

### COUNSEL

Walter Dellinger argued the cause for petitioner.

Irving L. Gornstein argued the cause for the United States, as amicus curiae, by special leave of court.

Kenneth L. Thomas argued the cause for respondent.

Kevin C. Newsom argued the cause for Alabama, as amicus curiae, by special leave of court.

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CITY OF SHERRILL, NEW YORK, Petitioner

v

ONEIDA INDIAN NATION OF NEW YORK, et al.

544 US —, 161 L Ed 2d 386, 125 S Ct 1478

[No. 03-855]

Argued January 11, 2005.

Decided March 29, 2005.

**Decision:** Indian tribe's open-market purchase of historic reservation land parcels that had been last held by tribe 200 years previously held not to revive tribe's sovereignty over parcels so as to exempt tribe from payment of local property taxes.

## SUMMARY

In a 1794 treaty, the United States guaranteed the Oneida Indian Nation's "free use and enjoyment" of a 300,000-acre reservation in the state of New York. However, the state continued to purchase reservation land from the Oneidas, and the Federal Government ultimately pursued a policy designed to open reservation lands to white settlers and to remove tribes westward. Many Oneidas, pressured by the removal policy, left the state. Those who stayed sold most of their remaining lands, so that by 1920, the Oneidas retained only 32 acres in the state.

In *County of Oneida v Oneida Indian Nation* (1985) 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245, the United States Supreme Court (1) held that the Oneidas could maintain a claim to be compensated for violation of their possessory rights on the basis of federal common

law, but (2) reserved the question whether equitable considerations ought to limit the relief available.

In 1997 and 1998, the Oneida Indian Nation of New York—a federally recognized tribe that was a direct descendant of the Oneida Indian Nation—purchased on the open market various parcels of land, located in a city in New York, that had been contained within the Oneida reservation, but had been last possessed by the tribe in 1805. For two centuries, governance of the area in question had been provided by the state and its county and municipal units. According to the 2000 census, over 99 percent of the area's population was non-Indian. Nevertheless, the tribe maintained that the properties were tax exempt and accordingly refused to pay property taxes assessed by the city.

After the city initiated state-court eviction proceedings, the tribe filed suit in the United States District Court for the Northern District of New York for equitable relief prohibiting, currently and in the future, the imposition of property taxes. The District Court, in granting summary judgment to the tribe, concluded that the parcels of land in question were not taxable (145 F Supp 2d 226). The United States Court of Appeals for the Second Circuit affirmed (337 F3d 139).

On certiorari, the Supreme Court reversed and remanded. In an opinion by GINSBURG, J., joined by REHNQUIST, Ch. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., it was held that:

(1) Under the circumstances presented, the tribe's acquisition of fee title to the parcels in question did not unify fee and aboriginal title so as to revive the tribe's ancient sovereignty piecemeal over each parcel—and thus the tribe could not resist the payment of local property taxes on such parcels—for, among other considerations, (a) there had been a long lapse of time during which the tribe had not sought to revive its

sovereign control through equitable relief in court; (b) there had been attendant dramatic changes in the character of the properties; and (c) the unilateral re-establishment of present and future Indian sovereign control, even over land purchased at the market price, would have had disruptive practical consequences.

(2) Standards of federal Indian law and federal equity practice precluded the tribe from reasserting sovereignty in a suit for declaratory and injunctive relief, for the circumstances of the case (a) evoked the doctrines of laches, acquiescence, and impossibility; and (b) rendered inequitable the piecemeal shift in governance that the tribe's suit sought unilaterally to initiate.

SOUTER, J., concurring, expressed the view that (1) the tribe's inaction, in failing to assert sovereignty over the parcels in question over a long period of time, was central to the claims of right made by the contending parties; and (2) although the subject of such inaction had not been expressly raised as a separate question presented for review, reargument was unnecessary, as the issue had been addressed by each side in the argument prior to submission of the case.

STEVENS, J., dissenting, expressed the view that (1) all of the land owned by the tribe within the boundaries of its historic reservation qualified as "Indian country," as that term was defined in 18 USCS § 1151, and (2) the city thus had no jurisdiction to tax the parcels without express congressional consent.

## COUNSEL

Ira S. Sacks argued the cause for petitioner.

Caitlin J. Halligan argued the cause for the state of New York, as amicus curiae, by special leave of court.

Michael R. Smith argued the cause for respondents.  
Malcolm L. Stewart argued the cause for the United  
States, as amicus curiae, by special leave of court.

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AZEL P. SMITH, et al., Petitioners

v

CITY OF JACKSON, MISSISSIPPI, et al.

544 US —, 161 L Ed 2d 410, 125 S Ct 1536

[No. 03-1160]

Argued November 3, 2004.

Decided March 30, 2005.

**Decision:** Age Discrimination in Employment Act of 1967 (29 USCS §§ 621 et seq.) held to authorize recovery under disparate-impact theory available under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.).

## SUMMARY

Section 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) (29 USCS § 623(a)(2)) made it unlawful for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age . . . .”

The city of Jackson, Mississippi, in an attempt to bring the starting salaries of its police and public safety officers to the regional average, revised the city’s pay plan to grant pay raises to all such officers. Under the revised plan, officers with fewer than 5 years of service received proportionately greater raises than those with more seniority. Most officers over 40 years old had more than 5 years of service.

A group of older officers filed, under the ADEA (29 USCS §§ 621 et seq.), a suit alleging that (1) the city

had deliberately discriminated against them because of their age (a disparate-treatment claim), and (2) they were adversely affected by the pay plan because of their age (a disparate-impact claim). The United States District Court for the Southern District of Mississippi granted the city summary judgment on both claims (2002 US Dist LEXIS 27284). On appeal, the United States Court of Appeals for the Fifth Circuit (1) held that the ruling on the disparate-treatment claim had been premature, but (2) affirmed the dismissal of the disparate-impact claim (351 F3d 183).

On certiorari, the United States Supreme Court affirmed. In that part of an opinion by STEVENS, J., which constituted the opinion of the court and which was joined by SCALIA, SOUTER, GINSBURG, and BREYER, JJ., it was held that (1) the disparate-impact theory announced in *Griggs v Duke Power Co.* (1971) 401 US 424, 28 L Ed 2d 158, 91 S Ct 849, for cases brought under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.) was cognizable under the ADEA; but (2) the officers had not set forth a valid disparate-impact claim, as the revision of the pay plan was based on a reasonable factor other than age. Also, STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., expressed the view that the ADEA's text, the ADEA's provision permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age," and Equal Employment Opportunity Commission (EEOC) regulations all supported the conclusion that a disparate-impact theory was cognizable under the ADEA.

SCALIA, J., concurring in part and concurring in the judgment, (1) agreed that disparate-impact recovery was available under the ADEA; but (2) expressed the view that the court, rather than independently determining that such recovery was available, ought to have

deferred to the EEOC's interpretation, expressed in numerous cases in the lower courts, that the ADEA authorized disparate-impact claims.

O'CONNOR, J., joined by KENNEDY and THOMAS, JJ., concurring in the judgment, expressed the view that disparate-impact claims were not cognizable under the ADEA, as the statute's text, legislative history, and purpose made clear that Congress did not intend the statute to authorize such claims.

REHNQUIST, Ch. J., did not participate.

### COUNSEL

Thomas C. Goldstein argued the cause for petitioners.

Glen D. Nager argued the cause for respondents.

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CHARLES RUSSELL RHINES, Petitioner

v

DOUGLAS WEBER, WARDEN

544 US —, 161 L Ed 2d 440, 125 S Ct 1528

[No. 03-9046]

Argued January 12, 2005.

Decided March 30, 2005.

**Decision:** With respect to state prisoner's filing "mixed" federal habeas corpus petition, containing some claims that had been exhausted in state courts and some that had not, Federal District Court held to have limited discretion to use "stay and abeyance" procedure for exhaustion.

## SUMMARY

With respect to a state prisoner's filing a "mixed" federal habeas corpus petition—containing some claims that had been exhausted in the state courts and some that had not—in *Rose v Lundy* (1982) 455 US 509, 71 L Ed 2d 379, 102 S Ct 1198, the United States Supreme Court (1) held that Federal District Courts could not adjudicate such mixed petitions; (2) imposed a "total exhaustion" requirement; and (3) directed federal courts to effectuate that requirement by (a) dismissing a mixed petition without prejudice, and (b) allowing such a prisoner to return to a state court to present the unexhausted claims to that court in the first instance.

Subsequently, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (PL 104-132) both (1) in 28 USCS § 2254(b)(1)(A), preserved the total-

exhaustion requirement of *Rose v Lundy*; and (2) in 28 USCS § 2244(d), imposed a general 1-year limitations period on filing federal habeas corpus petitions. As a result, state prisoners who came to federal court with mixed petitions ran the risk of forever losing the opportunity for any federal review of the prisoners' unexhausted claims.

Some lower federal courts approved the use of a "stay and abeyance" procedure, under which a District Court, when faced with a state prisoner's mixed petition, would stay the petition to allow the prisoner (1) to present the unexhausted claims to a state court in the first instance, and (2) then, to return to federal court for review of the perfected petition.

An accused was (1) convicted in a South Dakota court on charges including first-degree murder, (2) sentenced to death, and (3) unsuccessful both on direct review and in state habeas corpus proceedings. In 2000, the accused filed a then-timely federal habeas corpus petition in the United States District Court for the District of South Dakota. However, after AEDPA's limitations period had run, the District Court held that some of the accused's claims had not been exhausted. The accused therefore moved the District Court to hold his pending federal habeas corpus petition in abeyance, while he presented his unexhausted claims to the South Dakota courts. The District Court (1) granted the motion, and (2) issued a stay conditioned upon the accused's commencing (as he did) state-court exhaustion proceedings.

On appeal, the United States Court of Appeals for the Eighth Circuit—in vacating the stay and in ordering a remand—expressed the view that a Court of Appeals precedent precluded the District Court from staying the accused's exhausted claims while he sought state postconviction relief on unexhausted claims (346 F3d

799). The Court of Appeals then denied rehearing (2003 US App LEXIS 23865).

On certiorari, the Supreme Court vacated and remanded. In an opinion by O'CONNOR, J., joined by REHNQUIST, Ch. J., and STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., it was held, with respect to a state prisoner's filing a mixed federal habeas corpus petition, that:

(1) A District Court had the discretion, but only in limited circumstances, to use the stay-and-abeyance procedure, for even though the interplay of AEDPA's provisions posed a grave and difficult problem—and even though AEDPA did not deprive the District Courts of their ordinary authority to issue stays—(a) AEDPA did circumscribe the District Courts' discretion; and (b) the stay-and-abeyance procedure, if employed too frequently, had the potential to undermine AEDPA's purposes.

(2) Thus, for example,

(a) A stay and abeyance would be appropriate only when a District Court determined that there was good cause for a prisoner's failure to exhaust claims first in state court.

(b) Even if a prisoner had such good cause, a District Court would abuse its discretion if the court were to grant a stay when the unexhausted claims were plainly meritless.

(c) Even where a stay and abeyance was appropriate, the District Court's discretion in structuring the stay was limited by the timeliness concerns reflected in AEDPA.

(3) In the case at hand, the Court of Appeals had erred to the extent that the Court of Appeals had held that such a stay and abeyance was always impermissible.

STEVENS, J., joined by GINSBURG and BREYER, JJ., concurring, agreed with the Supreme Court's opinion on 128

the understanding that the opinion's reference to "good cause" for failing to exhaust state remedies more promptly was not intended to impose the sort of strict and inflexible requirement that would trap an unwary pro se prisoner.

SOUTER, J., joined by GINSBURG and BREYER, JJ., concurring in part and concurring in the judgment, expressed the view that instead of conditioning a stay and abeyance on good cause for delay, this procedure ought to be made unavailable on a demonstration of intentionally dilatory litigation tactics.

### COUNSEL

Roberto A. Lange argued the cause for petitioner.  
Lawrence E. Long argued the cause for respondent.

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EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., and MOBIL YANBU PETRO-CHEMICAL COMPANY, INC., Petitioners

v

SAUDI BASIC INDUSTRIES CORPORATION

544 US —, 161 L Ed 2d 454, 125 S Ct 1517

[No. 03-1696]

Argued February 23, 2005.

Decided March 30, 2005.

**Decision:** Lack of subject-matter jurisdiction under Rooker-Feldman doctrine held applicable to only suits seeking Federal District Courts' rejection of state-court judgments rendered before parallel District Court proceedings commenced.

## SUMMARY

In *Rooker v Fidelity Trust Co.* (1923) 263 US 413, 68 L Ed 362, 44 S Ct 149, the United States Supreme Court held that—as (1) Federal District Courts are empowered to exercise only original, not appellate, jurisdiction; and (2) Congress had empowered the Supreme Court alone to exercise appellate authority to reverse or modify a state-court judgment—District Courts lacked jurisdiction over suits seeking reversal or modification of state-court judgments. In *District of Columbia Court of Appeals v Feldman* (1983) 460 US 462, 75 L Ed 2d 206, 103 S Ct 1303, the Supreme Court, referring to *Rooker*, held that a Federal District Court lacked subject-matter jurisdiction to review a final determination of the District of Columbia Court of Appeals. Since *Feldman*, the United States Supreme Court had never

applied the “Rooker-Feldman doctrine” to dismiss an action for want of jurisdiction.

Two subsidiaries of an American corporation formed joint ventures with a Saudi corporation. When a dispute arose over royalties that the Saudi corporation had charged the joint ventures, the Saudi corporation preemptively sued the subsidiaries in the Delaware Superior Court, seeking a declaratory judgment that the royalties were proper. About 2 weeks later, the American corporation and the subsidiaries countersued in the United States District Court for the District of New Jersey, alleging that the Saudi corporation had overcharged the joint ventures for sublicenses.

Before the trial in the Superior Court, the Saudi corporation moved to dismiss the federal suit. After the District Court denied the motion (194 F Supp 2d 378), the Saudi corporation took an interlocutory appeal. The Superior Court entered a judgment on a jury verdict of over \$400 million in favor of the subsidiaries (866 A2d 1). The Saudi corporation appealed this judgment to the Delaware Supreme Court.

On interlocutory appeal, over 8 months after the state-court jury verdict, the United States Court of Appeals for the Third Circuit, on its own motion, raised the question whether subject-matter jurisdiction over the federal suit failed under the Rooker-Feldman doctrine because the American corporation’s claims had already been litigated in state court. The Court of Appeals (1) did not question the District Court’s subject-matter jurisdiction at the outset of the suit; but (2) held that federal jurisdiction had terminated when the Superior Court had entered judgment on the jury verdict (364 F3d 102).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by GINSBURG, J.,

expressing the unanimous view of the court, it was held that:

- (1) The Rooker-Feldman doctrine was confined to cases that (a) were brought in a District Court by state-court losers complaining of injuries caused by state-court judgments rendered before the District Court proceedings, and (b) invited District Court review and rejection of those judgments.
- (2) Rooker-Feldman did not (a) otherwise override or supplant preclusion doctrine, or (b) augment the circumscribed doctrines that allowed federal courts to stay or dismiss proceedings in deference to state-court actions.
- (3) In the case at hand, Rooker-Feldman did not prevent the District Court from exercising jurisdiction.

#### **COUNSEL**

Gregory S. Coleman argued the cause for petitioners.

Gregory A. Castanias argued the cause for respondent.

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ROBERT JOHNSON, Jr., Petitioner

v

UNITED STATES

544 US —, 161 L Ed 2d 542, 125 S Ct 1571

[No. 03-9685]

Argued January 18, 2005.

Decided April 4, 2005.

**Decision:** Limitation period of 28 USCS § 2255, ¶ 6(4) held not available to federal prisoner who filed § 2255 motion to vacate enhanced federal sentence, but who had not shown due diligence in challenging predicate state conviction.

## SUMMARY

In 1994, an accused pleaded guilty in the United States District Court for the Middle District of Georgia to a federal drug offense. The District Court imposed an enhanced career-offender sentence under § 4B1.1 of the Federal Sentencing Guidelines (18 USCS Appx), owing to the defendant's two 1989 convictions by the state of Georgia for distributing cocaine. The United States Court of Appeals for the Eleventh Circuit affirmed (73 F3d 1108), and in 1996 the United States Supreme Court denied certiorari (517 US 1162, 134 L Ed 2d 659, 116 S Ct 1559).

Two days after the accused's federal conviction became final, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (PL 104-132) went into effect, imposing, among other things, a 1-year statute of limitations on motions by prisoners seeking to vacate or modify their federal sentences under 28 USCS § 2255.

The 1-year period ran from the latest of four alternative dates, the last of which was “the date on which the facts supporting the claim . . . could have been discovered through the exercise of due diligence” (28 USCS § 2255, ¶ 6(4)). A fifth option, supplied uniformly by the Federal Courts of Appeals, gave prisoners whose convictions had become final before the AEDPA a 1-year grace period running from the AEDPA’s effective date.

On April 25, 1997, 1 year and 3 days after the accused’s federal conviction became final and just after the 1-year grace period expired, the accused—as a federal prisoner—filed pro se a motion in the District Court for a 60-day extension of time to attack his federal sentence under § 2255. The District Court denied the motion as untimely.

On February 6, 1998, the accused petitioned for a state writ of habeas corpus in the Superior Court of Wayne County, Georgia, on the asserted ground that seven state convictions of his—including one of his 1989 convictions—had been based on invalid guilty pleas. The Superior Court entered an order of vacatur reversing all seven convictions.

Just over 3 months later, the accused filed a § 2255 motion in the District Court to vacate his enhanced federal sentence in light of the Superior Court’s vacatur order. He claimed, in effect, that his motion was timely because the vacatur order constituted previously undiscoverable “facts supporting the claim” that triggered a renewed limitation period under § 2255, ¶ 6(4). The District Court denied the motion. The Court of Appeals, in affirming, reasoned that the vacatur order was not a “fact” discovered by the accused, but was more properly classified as a legal proposition or a court action obtained at the accused’s behest (340 F3d 1219, reh in banc den 353 F3d 1328).

On certiorari, the Supreme Court affirmed. In an opinion by SOUTER, J., joined by REHNQUIST, Ch. J., and O'CONNOR, THOMAS, and BREYER, JJ., it was held that although the vacatur order was a matter of fact for purposes of § 2255, ¶ 6(4), the limitation period of ¶ 6(4) was not available to the accused, for:

- (1) In a case involving a prisoner's collateral attack under § 2255 on a federal sentence on the ground that a state conviction used to enhance that sentence had since been vacated, the limitation period of ¶ 6(4) was to begin when the prisoner received notice of the order vacating the prior conviction, provided that the prisoner had sought the order with due diligence in state court, after entry of judgment in the federal case with the enhanced sentence.
- (2) Thus, the accused in the case at hand had been obliged to act diligently—from the date when judgment was entered in the federal case—to obtain a state-court order vacating his predicate conviction.
- (2) Even if the burden of diligence were to be moved ahead to the date of finality of the federal conviction or to the AEDPA's effective date, the accused would still have delayed unreasonably.
- (3) The accused had offered no explanation for this delay, beyond observing that he was acting pro se and lacked the sophistication to understand the procedures. However, pro se representation alone or procedural ignorance had never been accepted as an excuse for prolonged inattention when a statute's clear policy called for promptness.
- (4) On the record presented, the accused had fallen far short of reasonable diligence in challenging the state conviction.

KENNEDY, J., joined by STEVENS, SCALIA, and GINSBURG, JJ., dissenting, (1) agreed that a state court's vacatur order was a "fact" that began the limitation period of

§ 2255, ¶ 6(4); but (2) disagreed with the requirement that a § 2255 petitioner show due diligence in seeking the vacatur itself; and (3) expressed the view that ¶ 6(4) ought to have been deemed satisfied if the § 2255 proceeding was commenced within 1 year of the entry of vacatur, unless the petitioner were to show that the vacatur was not reasonably discovered until later, in which case that date would control when the limitation period began to run.

### **COUNSEL**

Courtland Reichman argued the cause for petitioner.  
Dan Himmelfarb argued the cause for respondent.

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RICHARD GERALD ROUSEY, et ux., Petitioners

v

JILL R. JACOWAY

544 US —, 161 L Ed 2d 563, 125 S Ct 1561

[No. 03-1407]

Argued December 1, 2004.

Decided April 4, 2005.

**Decision:** Individual Retirement Accounts (IRAs) held allowed to be exempted from bankruptcy estate under § 522(d)(10)(E) of Bankruptcy Code (11 USCS § 522(d)(10)(E)).

## SUMMARY

Under § 522(d)(10)(E) of the Bankruptcy Code (11 USCS § 522(d)(10)(E)), a debtor may exempt from the bankruptcy estate the debtor's "right to receive . . . a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of . . . age" to the extent that the payment is reasonably necessary to support the accountholder or the accountholder's dependents.

A husband and wife, each of whom had an account that qualified as an Individual Retirement Account (IRA) under the Internal Revenue Code (26 USCS §§ 1 et seq.), filed, in the United States Bankruptcy Court for the Western District of Arkansas, a joint petition for bankruptcy under Chapter 7 of the Bankruptcy Code (11 USCS §§ 701 et seq.). The couple sought to shield portions of their IRAs from their creditors by claiming them as exempt from the bankruptcy estate under § 522(d)(10)(E). However, the bankruptcy trustee (1)

objected to the claimed exemption, and (2) moved for turnover of the IRAs to the trustee.

The Bankruptcy Court sustained the trustee's objection and granted her motion (275 BR 307), and the United States Bankruptcy Appellate Panel for the Eighth Circuit upheld the Bankruptcy Court's judgment (283 BR 265). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the Appellate Panel's judgment, as the Court of Appeals concluded that, even if the couple's IRAs were similar plans or contracts to the plans specified in § 522(d)(10)(E), the IRAs gave the couple no right to receive payment on account of age or any other factor specified in the statute (347 F3d 689).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by THOMAS, J., expressing the unanimous view of the court, it was held that the couple could exempt assets in their IRAs from their bankruptcy estate under § 522(d)(10)(E), as (1) payments from IRAs were on account of age, and (2) IRAs were similar plans to stock bonus, pension, profitsharing, or annuity plans.

## COUNSEL

Pamela S. Karlan argued the cause for petitioners.  
Colli C. McKiever argued the cause for respondent.

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DURA PHARMACEUTICALS, INC., et al., Petitioners  
v

MICHAEL BROUDO et al.

544 US —, 161 L Ed 2d 577, 125 S Ct 1627

[No. 03-932]

Argued January 12, 2005.

Decided April 19, 2005.

**Decision:** Allegation of inflated purchase price held insufficient by itself to demonstrate loss and causation, for purposes of private damages action for securities fraud under § 10(b) of Securities Exchange Act of 1934 (15 USCS § 78j(b)) and Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5).

## SUMMARY

A private damages action for securities fraud has been implied by the courts from § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j(b)) and Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5). Also, Congress has imposed some statutory requirements on such actions, including the 15 USCS § 78u-4(b)(4) requirement that a private plaintiff who claims securities fraud must demonstrate economic loss.

Some private individuals allegedly had bought stock in a corporation on the public securities market during a particular period. After some initial proceedings, the individuals eventually filed, in the United States District Court for the Southern District of California, a second amended complaint, for a purported class action,

against the corporation and some of its managers and directors. The plaintiffs' lengthy complaint (1) included allegations of securities fraud under § 10(b) and Rule 10b-5; (2) asserted one claim which involved the defendants' alleged misrepresentations concerning a new asthmatic spray device; and (3) with respect to the loss supposedly caused by these alleged misrepresentations, contained only a statement that the plaintiffs had paid artificially inflated prices for the corporation's securities and had suffered damages. The District Court, in dismissing the complaint with prejudice, expressed the view, with respect to the spray-device claim, that the complaint had failed adequately to allege loss causation (2001 US Dist LEXIS 25907).

On appeal, the United States Court of Appeals for the Ninth Circuit, in reversing in pertinent part and in ordering a remand, expressed the view that the plaintiffs had sufficiently pleaded loss causation to survive a motion to dismiss with respect to the spray-device claim, as (1) the plaintiffs would establish loss causation if they showed that the price on the date of purchase was inflated because of the alleged misrepresentations; and (2) the complaint had (a) pleaded that the price at the time of purchase was overstated, and (b) sufficiently identified the cause (339 F3d 933).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BREYER, J., expressing the unanimous view of the court, it was held—with respect to the private damages action for securities fraud that the courts had implied from § 10(b) and Rule 10b-5—that:

(1) A private plaintiff, in a case involving public securities markets, cannot satisfy § 78u-4(b)(4) simply by alleging in the complaint, and subsequently establishing, that the price of a security on the date of purchase was inflated because of a misrepresentation, as:

(a) Normally, in such cases, an inflated purchase price will not itself constitute or proximately cause the relevant economic loss.

(b) Allowing the inflated purchase price alone to establish loss causation would lack support in precedent among the Courts of Appeals other than the Court of Appeals for the Ninth Circuit.

(c) The inflated-purchase-price approach would be contrary to Congress' intent to permit private securities fraud actions for recovery only where plaintiffs adequately allege and prove the traditional elements of causation and loss.

(2) Thus, in the case at hand, the plaintiffs' complaint was legally insufficient in alleging the spray-device claim for securities fraud, for:

(a) The complaint's inflated-purchase-price allegation was not legally relevant.

(b) The complaint nowhere else provided the defendants with notice of what (i) the relevant economic loss might be, or (ii) the causal connection might be between that loss and the alleged misrepresentations.

## COUNSEL

William F. Sullivan argued the cause for petitioners.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

Patrick J. Coughlin argued the cause for respondents.

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DAVID B. PASQUANTINO, CARL J. PASQUANTINO,  
and ARTHUR HILTS, Petitioners

v

UNITED STATES

544 US —, 161 L Ed 2d 619, 125 S Ct 1766

[No. 03-725]

Argued November 9, 2004.  
Decided April 26, 2005.

**Decision:** American citizens' scheme—involving interstate telephone calls—to deprive Canadian government of liquor tax revenue held to violate federal wire fraud statute (18 USCS § 1343).

## SUMMARY

The common-law revenue rule generally bars courts in the United States from enforcing the tax laws of foreign sovereigns, and has sometimes been applied to bar indirect enforcement of foreign revenue laws. The federal wire fraud statute (18 USCS § 1343), enacted in 1952, prohibits using interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

Three American citizens were convicted, in the United States District Court for the District of Maryland, of violating the wire fraud statute by carrying out a scheme under which two of the accused had ordered liquor from stores in one state by telephone calls from another state and then had paid others, including the third accused, to smuggle the liquor into Canada without paying the required Canadian excise taxes.

On appeal, a panel of the United States Court of Appeals for the Fourth Circuit reversed the convictions (305 F3d 291). Subsequently, the Court of Appeals (1) granted rehearing en banc, (2) vacated the panel's decision, (3) concluded that the revenue rule did not preclude the United States from prosecuting the accused, and (4) affirmed the accused's convictions (336 F3d 321).

On certiorari, the United States Supreme Court affirmed. In an opinion by THOMAS, J., joined by REHNQUIST, Ch.J., and STEVENS, O'CONNOR, and KENNEDY, JJ., it was held that the accused's smuggling scheme violated the wire fraud statute, as:

- (1) The plain terms of § 1343 criminalized such a scheme, for (a) the accused had engaged in a scheme or artifice to defraud; and (b) the object of the fraud was money or property in the victim's hands.
- (2) This construction of the statute did not derogate from the common-law revenue rule, for the statute derogated from no well-established revenue-rule principle, where (a) the Supreme Court was aware of no common-law revenue rule case decided as of 1952 that had held or clearly had implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes; and (b) the traditional rationales for the revenue rule did not plainly suggest that the rule swept so broadly.

GINSBURG, J., joined by BREYER, J., and joined as to points 2 and 3 below by SCALIA and SOUTER, JJ., dissenting, expressed the view that (1) the presumption against extraterritoriality provided ample cause to conclude that the wire fraud statute did not extend to the accused's scheme; (2) prosecution of the accused directly implicated the revenue rule, which Congress had not endeavored, by enacting statute, to displace; and

(3) the rule of lenity counseled against adopting the Supreme Court's interpretation of the statute.

### **COUNSEL**

Laura W. Brill argued the cause for petitioners.  
Michael R. Dreeben argued the cause for respondent.

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GARY SHERWOOD SMALL, Petitioner

v

UNITED STATES

544 US —, 161 L Ed 2d 651, 125 S Ct 1752

[No. 03-750]

Argued November 3, 2004.

Decided April 26, 2005.

**Decision:** In 18 USCS § 922(g)(1)—generally making it unlawful for person, convicted in any court of crime punishable by prison term exceeding 1 year, to possess firearm—phrase “convicted in any court” held not to refer to foreign courts.

## SUMMARY

An accused was indicted on a charge of violating 18 USCS § 922(g)(1), which generally made it unlawful for a person, convicted “in any court” of a crime punishable by imprisonment for a term exceeding 1 year, to possess a firearm. According to the indictment, the accused had previously been convicted in a Japanese court—and had been sentenced to 5 years’ imprisonment—for some violations of Japanese law. The United States District Court for the Western District of Pennsylvania denied the accused’s motion to dismiss the indictment (183 F Supp 2d 755). Subsequently, the accused pleaded guilty to the § 922(g)(1) charge while reserving the right to challenge his conviction on the ground that the prior Japanese conviction fell outside the scope of § 922(g)(1).

The District Court (1) sentenced the accused pursuant to his conditional guilty plea, but (2) allowed the

accused to remain on bail pending appeal from the denial of the motion to dismiss. On appeal, the United States Court of Appeals for the Third Circuit affirmed, having concluded that there were no grounds for nonrecognition of the Japanese conviction as the predicate offense to the accused's § 922(g)(1) conviction (333 F3d 425).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BREYER, J., joined by STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., it was held that in § 922(g)(1), the phrase "convicted in any court" referred only to domestic courts, not to foreign nations' courts, for:

(1) It was appropriate to assume that the phrase applied domestically, not extraterritorially, as (a) the phrase described one necessary portion of the gun-possession activity that was prohibited as a matter of domestic law; and (b) foreign convictions, considered as a group, differed from domestic convictions in important ways.

(2) The language of § 922(g)(1) did not suggest any intent to reach beyond domestic convictions, and such language would have created anomalies if read to include foreign convictions.

(3) The legislative history of § 922(g)(1) confirmed that Congress had not considered whether foreign convictions should serve as a predicate to liability.

(4) Although the purpose of § 922(g)(1) offered some support for a reading of the phrase that included foreign convictions, the empirical fact that there had been few instances in which such a foreign conviction had served as a predicate for a felon-in-possession prosecution reinforced the likelihood that Congress, at best, had paid no attention to the matter.

THOMAS, J., joined by SCALIA and KENNEDY, JJ., dissenting, expressed the view that the Supreme Court, in

concluding that “any” meant only “a subset of any,” had distorted the plain meaning of § 922(g)(1) and departed from established principles of statutory construction.

REHNQUIST, Ch. J., did not participate.

### **COUNSEL**

Paul D. Boas argued the cause for petitioner.

Patricia A. Millett argued the cause for respondent.

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JOHN A. PACE, Petitioner

v

DAVID DiGUGLIELMO, SUPERINTENDENT, STATE  
CORRECTIONAL INSTITUTION AT GRATERFORD,  
et al.

544 US —, 161 L Ed 2d 669, 125 S Ct 1807

[No. 03-9627]

Argued February 28, 2005.

Decided April 27, 2005.

**Decision:** State prisoner's postconviction petition that was rejected by state court as untimely held not "properly filed" for purposes of 28 USCS § 2244(d)(2); prisoner held not entitled to statutory or equitable tolling of federal habeas corpus time limit.

## SUMMARY

A provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 USCS § 2244(d)(1)) established a 1-year statute of limitations for a state prisoner's filing of a federal habeas corpus petition. However, under another AEDPA provision (28 USCS § 2244(d)(2)), this limitations period was to be tolled while a "properly filed" application for state postconviction or other collateral review with respect to the pertinent judgment or claim was pending.

In February 1986, an accused pleaded guilty in a Pennsylvania state court to second-degree murder and possession of an instrument of crime. In August 1986, the accused filed a petition in the Superior Court of Pennsylvania for state postconviction relief. The Supe-

rior Court found the petition untimely, and in September 1992, the Supreme Court of Pennsylvania denied review.

In 1996, the accused filed a postconviction petition under a new state provision, which included a statute of limitations with three exceptions. This petition set forth three claims, of which (1) two had been available to the accused as early as 1986, and (2) the third related only to events occurring in or before 1991. The Superior Court, ultimately dismissing this petition as untimely, noted that the accused had neither alleged nor proven that he fell within any of the exceptions to the limitations period. The Pennsylvania Supreme Court denied review in July 1999.

In December 1999, the accused filed a federal habeas corpus petition under 28 USCS § 2254 in the United States District Court for the Eastern District of Pennsylvania. The District Court—in disapproving a Magistrate Judge's recommendation that the habeas corpus petition be dismissed as time-barred under the AEDPA—concluded that the accused was entitled to tolling for the time during which his second state postconviction petition had been pending, for (1) because the state provision set up judicially reviewable exceptions to the time limit for a postconviction petition, this time limit was not a condition to filing, but rather a condition to obtaining relief; (2) therefore, the fact that the accused's second postconviction petition had been rejected as untimely did not prevent that petition from being “properly filed” within the meaning of § 2244(d)(2); and (3) alternatively, there were extraordinary circumstances justifying equitable tolling (151 F Supp 2d 586).

The United States Court of Appeals for the Third Circuit, in reversing, concluded that (1) the state provision's time limit constituted a condition to filing;

(2) therefore, the second postconviction petition had not been “properly filed”; and (3) there were no extraordinary circumstances justifying equitable tolling (71 Fed Appx 127).

On certiorari, the United States Supreme Court affirmed. In an opinion by REHNQUIST, Ch. J., joined by O’CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., it was held that:

(1) A state prisoner’s postconviction petition that was rejected by a state court as untimely would not be “properly filed” for purposes of § 2244(d)(2), notwithstanding that the state’s law set up some exceptions to the state’s time limit, for among other reasons, (a) allowing a state prisoner to toll at will the federal habeas corpus statute of limitations simply by filing untimely state postconviction petitions would be contrary to the purpose of AEDPA and would open the door to abusive delay; (b) timeliness was no less a “filing” requirement than mechanical rules that were enforceable by state court clerks; (c) it was not true that any condition which had to be applied on a claim-by-claim basis, such as a state’s time limit, could not be a condition to filing for purposes of § 2244(d)(2); and (d) for purposes of determining what were “filing” conditions, there was a distinction between (i) time limits, which went to the very initiation of a petition and a court’s ability to consider that petition, and (ii) procedural bars prescribing a rule of decision for a court, which bars went to the ability to obtain relief.

(2) The accused in the case at hand was not entitled to equitable tolling—regardless of whether he had satisfied an “extraordinary circumstance” test—for under the circumstances presented, he had not established the requisite diligence in pursuing his rights.

STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., dissenting, expressed the view that (1) under the

Supreme Court's approach, a state postconviction-relief application would not be deemed properly filed—no matter how long a state court held the petition, how carefully that court reviewed the merits of the petition's claims, or how that court justified its decision—if the state court ultimately determined that particular claims contained in the application failed to comply with the applicable state statute of limitations; and (2) such an interpretation of § 2244(d)(2) was not compelled by the text of that provision and would frustrate its purpose.

### COUNSEL

David Wycoff argued the cause for petitioner.

Ronald Eisenberg argued the cause for respondents.

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DENNIS BATES, et al., Petitioners

v

DOW AGROSCIENCES LLC

544 US —, 161 L Ed 2d 687, 125 S Ct 1788

[No. 03-388]

Argued January 10, 2005.

Decided April 27, 2005.

**Decision:** Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 USCS §§ 136 et seq.), held not to pre-empt at least some state-law claims, by Texas peanut farmers, for damages from particular pesticide's allegedly injuring farmers' crops.

## SUMMARY

The Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA) (7 USCS §§ 136 et seq.), generally provides for the federal regulation of covered pesticides, including registration and labeling requirements. While 7 USCS § 136v(a) authorizes some regulation of pesticides by a state, a pre-emption provision, 7 USCS § 136v(b), says that, "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

A particular pesticide had been registered by the pesticide's manufacturer with the Environmental Protection Agency (EPA), purportedly pursuant to the latter's authority under FIFRA. Some Texas peanut farmers alleged that in the 2000 growing season, their crops had been severely damaged by the application of this pesticide. The manufacturer filed a declaratory-

judgment action in a Federal District Court, asserting that the farmers' claims were expressly or impliedly pre-empted by FIFRA. The farmers brought a variety of counterclaims under state law. However, the District Court granted a motion by the manufacturer for summary judgment, as the court (1) rejected one claim on state-law grounds, and (2) dismissed the remainder as expressly pre-empted by § 136v(b).

The United States Court of Appeals for the Fifth Circuit, in affirming, (1) expressed the view that § 136v(b) pre-empted any state-law claim in which a judgment against the manufacturer would have induced it to alter its product label; and (2) ruled that the farmers' claims in question were pre-empted, including a purported strict-liability claim, alleging defective design, that the Court of Appeals treated as essentially a "disguised" failure-to-warn claim (332 F3d 323).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by STEVENS, J., joined by REHNQUIST, Ch. J., and O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., it was held that:

- (1) Even though, for purposes of determining the pre-emptive effect of § 136v(b) on state-law claims, the § 136v(b) term "requirements" embraced some common-law duties, for a particular state judge-made rule to be pre-empted, it had to (a) be a requirement "for labeling or packaging," and (b) impose a labeling or packaging requirement that was "in addition to or different from those required under this subchapter."
- (2) The Court of Appeals' inducement test for pre-emption was incorrect.
- (3) Instead, under the proper "parallel requirements" inquiry, a state-law labeling requirement was not pre-empted by § 136v(b) if the requirement was equivalent to, and fully consistent with, FIFRA's misbranding provisions.

(4) With respect to pre-empting the farmers' state-law claims in the case at hand:

(a) The farmers' claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not pre-empted.

(b) The case would be remanded as to the farmers' claims of fraud and (as read by the Court of Appeals) negligent failure to warn, where the Supreme Court had not received sufficient briefing on this issue, which involved questions of Texas law.

BREYER, J., concurring, stressed that state-law requirements had to be measured against relevant EPA regulations that gave content to FIFRA's misbranding standards.

THOMAS, J., joined by SCALIA, J., concurring in the judgment in part and dissenting in part, (1) agreed that (a) the § 136v(b) term "requirements" included common-law duties for labeling or packaging, (b) state-law damages claims could not impose requirements in addition to or different from FIFRA's, and (c) the case at hand ought to be remanded to consider whether Texas law mirrored the federal standards in question; but (2) expressed the view that (a) the Supreme Court had omitted a step in the court's reasoning that ought to be made explicit, (b) this step was that a state-law cause of action, even if not specific to labeling, nevertheless imposed a labeling requirement in addition to or different from FIFRA's when the cause of action attached liability to statements on a label that did not produce liability under FIFRA, and (c) under this reasoning, the Supreme Court had mistreated some of the farmers' claims.

**COUNSEL**

David C. Frederick argued the cause for petitioners.  
Seth P. Waxman argued the cause for respondent.  
Lisa S. Blatt argued the cause for the United States, as  
amicus curiae, by special leave of court.

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JENNIFER M. GRANHOLM, GOVERNOR OF  
MICHIGAN, et al., Petitioners

v

ELEANOR HEALD, et al. (03-1116)

MICHIGAN BEER & WINE WHOLESALERS ASSO-  
CIATION, Petitioner

v

ELEANOR HEALD, et al. (03-1120)

JUANITA SWEDENBURG, et al., Petitioners

v

EDWARD D. KELLY, CHAIRMAN, NEW YORK DIVI-  
SION OF ALCOHOLIC BEVERAGE CONTROL,  
STATE LIQUOR AUTHORITY, et al. (03-1274)

544 US —, 161 L Ed 2d 796, 125 S Ct 1885

Argued December 7, 2004.

Decided May 16, 2005.

**Decision:** State laws that allowed in-state wineries to sell wine directly to in-state consumers but barred out-of-state wineries from doing so—or made such sales economically impractical—held to violate Federal Constitution’s commerce clause (Art I, § 8, cl 3).

## SUMMARY

Under Michigan law, in-state wineries were allowed to ship directly to in-state consumers, subject only to a licensing requirement, but all out-of-state wine was required to pass through an in-state wholesaler and  
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retailer before reaching consumers. Under a New York state regulatory scheme, (1) all wine had to be sold through a licensee fully accountable to the state; (2) in-state producers, with the applicable licenses, could ship directly to consumers from their wineries; (3) out-of-state wineries were required to establish an in-state distribution operation—consisting of a branch office and warehouse—in order to become a licensee and gain the privilege of direct shipment; (4) out-of-state wineries were ineligible for a “farm winery” license, which provided the most direct means of shipping to in-state consumers; and (5) in-state wineries without direct-shipping licenses—but not out-of-state wineries—were allowed to distribute their wine through other wineries that had the applicable licenses.

Some Michigan residents—contending that Michigan’s direct-shipment laws discriminated against interstate commerce in violation of the Federal Constitution’s commerce clause (Art I, § 8, cl 3)—brought suit against various Michigan state officials in the United States District Court for the Eastern District of Michigan. The District Court granted summary judgment to the defendants (2001 US Dist LEXIS 24826). However, the United States Court of Appeals for the Sixth Circuit, in reversing and ordering a remand, concluded that (1) the Constitution’s Twenty-first Amendment—prohibiting the transportation or importation of intoxicating liquors into any state in violation of that state’s laws—did not immunize all state liquor laws from the strictures of the commerce clause; and (2) the Michigan scheme was unconstitutional, because the defendants had failed to demonstrate that the state could not meet its proffered policy objectives through nondiscriminatory means (342 F3d 517).

In a suit filed in the United States District Court for the Southern District of New York by some out-of-state

wineries and New York customers against some New York state officials, the plaintiffs sought a declaration that New York's direct-shipment laws violated the commerce clause. The District Court granted the plaintiffs summary judgment (232 F Supp 2d 135), but the United States Court of Appeals for the Second Circuit, in reversing, concluded that New York's laws fell within the ambit of the state's powers under the Twenty-first Amendment (358 F3d 223).

The United States Supreme Court, having consolidated these cases and granted certiorari, (1) affirmed the Sixth Circuit Court of Appeals' judgment, and (2) reversed the Second Circuit Court of Appeals' judgment and remanded that case for further proceedings. In an opinion by KENNEDY, J., joined by SCALIA, SOUTER, GINSBURG, and BREYER, JJ., it was held that:

(1) Both the Michigan scheme and the New York scheme discriminated against interstate commerce in violation of the commerce clause, for (1) such laws deprived citizens of access to the markets of other states on equal terms; (2) allowing states to discriminate against out-of-state wine would have invited a multiplication of preferential trade areas destructive of the very purpose of the commerce clause; and (3) the states had not demonstrated that such discrimination was needed in order to advance purposes such as (a) decreasing the risk of underage drinking, or (b) protecting against tax evasion.

(2) Neither state's scheme was saved by the Twenty-first Amendment, which did not allow states to regulate the direct shipment of wine on terms that discriminated in favor of in-state producers.

STEVENS, J., joined by O'CONNOR, J., dissenting, expressed the view that because the New York and Michigan laws regulated the transportation or importation of intoxicating liquors for delivery or use in those states,

they were exempt under the Twenty-first Amendment from scrutiny under the unwritten rules described as the "dormant" commerce clause.

THOMAS, J., joined by REHNQUIST, Ch. J., and STEVENS and O'CONNOR, JJ., dissenting, expressed the view that the Twenty-first Amendment and the Webb-Kenyon Act (27 USCS § 122)—which prohibited the transportation of liquor into a state to be used there in violation of state law—(1) displaced the negative commerce clause as applied to regulation of liquor imports into a state, and (2) required sustaining the constitutionality of Michigan's and New York's direct-shipment laws.

## COUNSEL

Clint Bolick argued the cause for petitioners in No. 03-1274.

Thomas L. Casey argued the cause for petitioners in No. 03-1116 and in No. 03-1120.

Kathleen Sullivan argued the cause for respondents in No. 03-1116 and No. 03-1120.

Caitlin Halligan argued the cause for respondents in No. 03-1274.

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LINDA LINGLE, GOVERNOR OF HAWAII, et al.,  
Petitioners

v

CHEVRON U. S. A. INC.

544 US —, 161 L Ed 2d 876, 125 S Ct 2074

[No. 04-163]

Argued February 22, 2005.

Decided May 23, 2005.

**Decision:** Prior formula, as to whether government regulation substantially advances legitimate state interests, held not to be valid method of identifying regulatory takings for which Federal Constitution's Fifth Amendment requires just compensation.

## SUMMARY

With respect to the takings clause of the Federal Constitution's Fifth Amendment, the United States Supreme Court held in *Agins v Tiburon* (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138—which involved a facial takings challenge to certain municipal zoning ordinances—that (1) the application of a general zoning law to particular property effects a taking if, among other matters, the law “does not substantially advance legitimate state interests”; but (2) the ordinances in question were not facially invalid, as, among other matters, these ordinances substantially advanced a legitimate governmental goal.

The state of Hawaii enacted a rent-cap statute which—allegedly in response to concerns about the effects of market concentration on retail gasoline

prices—purported to limit the rent that oil companies could charge dealers who leased service stations owned by the companies. An oil company (1) filed suit against some state officials in the United States District Court for the District of Hawaii; (2) raised several federal constitutional challenges, including a claim that the rent-cap statute, on its face, effected a taking of the company's property, in asserted violation of the Constitution's Fifth and Fourteenth Amendments; and (3) sought declaratory and injunctive relief. The company then moved for summary judgment on the company's takings claim, arguing that the rent-cap statute did not substantially advance any legitimate government interest. In turn, the District Court granted summary judgment to the company, as the court expressed the view that the statute (1) failed to advance substantially a legitimate state interest, and (2) as such, effected an unconstitutional taking (57 F Supp 2d 1003).

On appeal, the United States Court of Appeals for the Ninth Circuit (1) held that the District Court had applied the correct legal standard to the company's takings claim; but (2) vacated the grant of summary judgment, on the ground that a genuine issue of material fact remained as to whether the statute would benefit consumers (224 F3d 1030).

On remand, the District Court entered judgment for the company after a bench trial in which competing expert witnesses (both economists) were called to testify, as the District Court again expressed the view that the rent-cap statute effected an unconstitutional regulatory taking, on the basis that the statute failed to advance substantially any legitimate state interest (198 F Supp 2d 1182).

The Court of Appeals, in affirming, (1) held that its decision in the prior appeal barred the state from challenging the application of the substantially-

advances formula to the company's takings claim; and (2) rejected the state's challenge to the application of the substantially-advances formula to the facts of the case (363 F3d 846).

On certiorari, the Supreme Court reversed and remanded. In an opinion by O'CONNOR, J., expressing the unanimous view of the court, it was held that:

(1) The substantially-advances formula of *Agins v Tiburon* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation, where:

(a) This substantially-advances formula is doctrinally untenable as a takings test.

(b) Application of the substantially-advances formula as such would present serious practical difficulties.

(2) Because the oil company had argued only a substantially-advances theory in support of the company's takings claim, the company was not entitled summary judgment on this claim.

KENNEDY, J., concurring, expressed the view that (1) the Supreme Court's decision did not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate federal constitutional due process; and (2) in the case at hand, the court had had no occasion to consider such a due process claim.

## COUNSEL

Mark J. Bennett argued the cause for petitioners.

Edwin S. Kneedler argued the cause for the United States, as amicus curiae, by special leave of court.

Craig E. Stewart argued the cause for respondent.

MIKE JOHANNS, SECRETARY OF AGRICULTURE,  
et al., Petitioners

v

LIVESTOCK MARKETING ASSOCIATION, et al.

(No. 03-1164)

NEBRASKA CATTLEMEN, INC., et al., Petitioners

v

LIVESTOCK MARKETING ASSOCIATION, et al.

(No. 03-1165)

544 US —, 161 L Ed 2d 896, 125 S Ct 2055

Argued December 8, 2004.

Decided May 23, 2005.

**Decision:** Beef-promoting advertisements funded, pursuant to federal statute, by assessments, or “check-offs,” on cattle sales and importation held to be (1) government’s speech, and (2) therefore exempt from First Amendment scrutiny.

## SUMMARY

A Beef Promotion and Research Act of 1985 (Beef Act) provision (7 USCS § 2901(b)) announced a federal policy of promoting the marketing and consumption of “beef and beef products” with the use of funds raised by an assessment on cattle sales and importation. Under the Beef Act (7 USCS §§ 2901 et seq.), (1) the Secretary of Agriculture was to implement this policy by issuing a Beef Promotion and Research Order (Beef Order) containing four specified key terms; (2) the Secretary was to appoint a Cattlemen’s Beef Promotion and Research Board (Beef Board), whose members

were to be (a) a geographically representative group of beef producers and importers, and (b) nominated by trade associations; (3) the Beef Board was to convene an Operating Committee composed of 10 Beef Board members and 10 representatives named by a federation of state beef councils; (4) the Secretary was to impose a \$1-per-head assessment (or "checkoff") on all sales or importation of cattle and a comparable assessment on imported beef products; and (5) the assessment was to be used to fund beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary. A Beef Order, promulgated in 1986 on a temporary basis, was made permanent after a large majority of beef producers voted, in a 1988 referendum, to continue the Beef Order.

Two associations whose members collected and paid the checkoff, along with several individuals who raised and sold cattle subject to the checkoff, brought suit in the United States District Court for the District of South Dakota against the Secretary, the Department of Agriculture, and the Beef Board. The plaintiffs' amended complaint alleged that the use of the beef checkoff for promotional activity violated the free speech guarantee of the Federal Constitution's First Amendment, as the advertising in question (1) promoted beef as a generic commodity, and (2) impeded the plaintiffs' efforts to promote the superiority of various specific types of beef.

The District Court (1) declared that the Beef Act and Beef Order unconstitutionally compelled the plaintiffs to subsidize speech to which they objected, (2) rejected the government's contention that the checkoff survived First Amendment scrutiny as funding only gov-

ernment speech, and (3) entered a permanent injunction barring any further collection of the beef checkoff (207 F Supp 2d 992).

The United States Court of Appeals for the Eighth Circuit, in affirming, concluded that the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising was not sufficiently substantial to justify the infringement on the plaintiffs' First Amendment free speech rights (335 F3d 711).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and O'CONNOR, THOMAS, and BREYER, JJ., it was held that the generic advertisements at issue were the government's own speech, and thus the checkoff was not susceptible to a First Amendment compelled-subsidy challenge, for:

- (1) The message set out in the beef promotions was, from beginning to end, a message established by the government.
- (2) The government was not precluded from relying on the government-speech doctrine merely because the government solicited assistance from nongovernmental sources in developing specific messages.
- (3) The fact that the beef advertisements were funded by a targeted assessment on beef producers, rather than by general revenues, did not prevent the advertisements from qualifying as government speech.
- (4) The beef advertisements were subject to political safeguards that were more than adequate to set the advertisements apart from private messages.

THOMAS, J., concurring, expressed the view that (1) generally, any regulation that compelled funding of advertising had to be subjected to the most stringent First Amendment scrutiny; (2) this principle had to be qualified where the regulation compelled funding of

speech that was the government's own; and (3) there was no analytical distinction between "pure" government speech funded from general tax revenues and speech funded from targeted exactions.

BREYER, J., concurring, expressed the view that (1) the beef-checkoff program in question was virtually identical to the mushroom-checkoff program struck down by the Supreme Court on First Amendment grounds in *United States v United Foods, Inc.* (2001) 533 US 405, 150 L Ed 2d 438, 121 S Ct 2334; but (2) the "government speech" theory adopted by the court in the instant consolidated cases had not been before the court in *United Foods*.

GINSBURG, J., concurring in the judgment, (1) declined to consider the promotional messages funded under the Beef Act, but not attributed to the government, to be government speech, given the message that the government conveyed in its own name; but (2) expressed the view that the assessments in question qualified as permissible economic regulation.

KENNEDY, J., dissenting, expressed the view that the speech at issue could not meaningfully be considered to be government speech.

SOUTER, J., joined by STEVENS and KENNEDY, JJ., dissenting, expressed the view that that (1) if the government relied on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, then the government had to make itself politically accountable by indicating that the content of the speech was a government message, not just the statement of one self-interested group that the government was currently willing to invest with power; (2) sometimes, as in the consolidated cases at hand, the government could make an effective disclosure only by explic-

itly labeling the speech as the government's own; and (3) the Beef Act (a) failed to require the government to show its hand, and (b) therefore was unconstitutional.

### COUNSEL

Edwin S. Kneedler argued the cause for petitioners in No. 03-1164.

Gregory G. Garre argued the cause for petitioners in No. 03-1165.

Laurence H. Tribe argued the cause for respondents.

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MICHAEL CLINGMAN, SECRETARY, OKLAHOMA  
STATE ELECTION BOARD, et al., Petitioners

v

ANDREA L. BEAVER et al.

544 US —, 161 L Ed 2d 920, 125 S Ct 2029

[No. 04-37]

Argued January 19, 2005.

Decided May 23, 2005.

**Decision:** Oklahoma statute, allowing political parties to open their primary elections to only their own party members and voters registered as Independents, held not to violate First Amendment free-association rights of party or of some members of other parties.

## SUMMARY

An Oklahoma statute imposed a semiclosed primary system, in which political parties could open their primary elections to only their own registered members and to voters who were registered as Independents. The Libertarian Party of Oklahoma—seeking to open its upcoming primary to all registered Oklahoma voters—and several Republican and Democratic voters (1) filed, in the United States District Court for the Western District of Oklahoma, an action for declaratory and injunctive relief; and (2) alleged that the statute unconstitutionally burdened their rights under the Federal Constitution’s First Amendment to freedom of political association.

The District Court rejected the constitutional challenge to the semiclosed-primary statute. On appeal, the

United States Court of Appeals for the Tenth Circuit reversed the District Court's judgment, as the Court of Appeals concluded that the statute (1) imposed a severe burden on the challengers' associational rights, and (2) was not narrowly tailored to serve a compelling state interest (363 F3d 1048).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by THOMAS, J., joined by REHNQUIST, Ch. J., and SCALIA and KENNEDY, JJ., and joined in pertinent part by O'CONNOR and BREYER, JJ., it was held that the semiclosed-primary statute did not violate the First Amendment free-association rights of the Libertarian Party or of the Republican and Democratic voters, as any burden that the semiclosed system imposed was minor and was justified by legitimate state interests, for the system advanced a number of regulatory interests that the Supreme Court recognized as important: (1) preserving political parties as viable and identifiable interest groups, (2) enhancing parties' electioneering and party-building efforts, and (3) guarding against party raiding and "sore loser" candidacies by spurned primary contenders.

O'CONNOR, J., joined in pertinent part by BREYER, J., concurring in part and concurring in the judgment, expressed the view that (1) the semiclosed primary system, standing alone, imposed only a modest, nondiscriminatory burden on the challengers' associational rights; and (2) this burden was justified by the state's legitimate regulatory interests; but (3) the challengers' claim implicated important associational interests that did not need to be minimized to dispose of the instant case.

STEVENS, J., joined by GINSBURG, J., and joined in pertinent part by SOUTER, J., dissenting, expressed the

view that (1) if a third party invited a member of the Republican or Democratic Party to participate in the third party's primary election, then the member's right to support in that election the candidate of the member's choice merited constitutional protection, whether by (a) making a speech, (b) donating funds, or (c) casting a ballot; and (2) states did not have a valid interest in (a) manipulating the outcomes of elections, (b) protecting the major parties from competition, or (c) stunting the growth of new parties.

### **COUNSEL**

Wellon B. Poe, Jr. argued the cause for petitioners.

Gene C. Schaerr argued the cause for South Dakota, et al., as amici curiae, by special leave of court.

James C. Linger argued the cause for respondents.

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CARMAN L. DECK, Petitioner

v

MISSOURI

544 US —, 161 L Ed 2d 953, 125 S Ct 2007

[No. 04-5293]

Argued March 1, 2005.

Decided May 23, 2005.

**Decision:** Due-process provisions of Federal Constitution's Fifth and Fourteenth Amendments held to prohibit, during penalty phase of capital trial, use on convicted offender of shackles that are visible to jury, unless use is justified by essential state interest.

## SUMMARY

An accused was convicted of murder and robbery, and received a death sentence, in a Missouri state court at a trial during which the state required the accused to wear leg braces that apparently were not visible to the jury. The Missouri Supreme Court upheld the accused's conviction but set aside his sentence (68 SW3d 418).

During the accused's new sentencing proceeding, he was (1) shackled with leg irons, handcuffs, and a belly chain, despite multiple objections by his counsel; and (2) again sentenced to death.

On appeal the Missouri Supreme Court (1) concluded that there was sufficient evidence in the record to support the trial court's requiring of shackles; and (2) affirmed the sentence (136 SW3d 481).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BREYER, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., it was held that:

- (1) The due-process provisions of the Federal Constitution's Fifth and Fourteenth Amendments prohibit, during the penalty phase of a capital trial, the use on a convicted offender of shackles that are visible to jury, unless such use is justified by an essential state interest, such as the interest in courtroom security, specific to the offender.
- (2) The Missouri Supreme Court's affirming of the accused's death sentence did not meet the Constitution's requirements, as the United States Supreme Court was unconvinced by arguments that the Missouri Supreme Court properly had found that (a) the record lacked evidence that the jury had seen the accused's restraints; (b) the trial court had acted within its discretion in requiring shackles, and (c) the defendant had suffered no prejudice by being shackled.

THOMAS, J., joined by SCALIA, J., dissenting, expressed the view that the court's holding in the instant case concerning the use of shackles during sentencing proceedings (1) was not supported by tradition at English common law or among the states; (2) needlessly extended the general no-shackles rule from the guilt phase of trials to the sentencing phase; (3) paid only superficial heed to the practice of states; (4) gave conclusive force to errant dicta from three of the court's cases; (5) defied common sense; and (6) all but ignored the serious security issues facing courts.

**COUNSEL**

Rosemary E. Percival argued the cause for petitioner.  
Cheryl C. Nield argued the cause for respondent.

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JOSE ERNESTO MEDELLIN, Petitioner

v

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

544 US —, 161 L Ed 2d 982, 125 S Ct 2088

[No. 04-5928]

Argued March 28, 2005.

Decided May 23, 2005.

**Decision:** Writ of certiorari—to consider questions about International Court of Justice's decision concerning purported Vienna Convention rights of Mexican nationals including accused—dismissed as improvidently granted, where state-court proceedings initiated after granting of certiorari might provide accused relief sought from Supreme Court.

## SUMMARY

An accused, a Mexican national who had confessed to participating in the gang rape and murder of two girls was, in a Texas state trial court, convicted and sentenced to death. After the Texas Court of Criminal Appeals affirmed the trial court's judgment, the accused filed in the trial court a state habeas corpus action in which he claimed for the first time that Texas had failed to notify him of his right to consular access under the Vienna Convention on Consular Relations (Convention) (TIAS No. 6820). The trial court rejected the claim, and the Court of Criminal Appeals affirmed

the trial court's judgment. The accused then filed a federal habeas corpus petition that again raised the Convention claim.

While the accused's application to the United States Court of Appeals for the Fifth Circuit for a certificate of appealability of a Federal District Court's denial of the federal habeas corpus petition was pending, the International Court of Justice (ICJ)—in a case in which Mexico had alleged violations of the Convention with respect to the accused and other Mexican nationals who were facing the death penalty in the United States—determined that (1) the Convention guaranteed individually enforceable rights; and (2) the United States (a) had violated those rights with respect to the individuals in question, and (b) was required to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of these individuals to determine whether the violations had caused actual prejudice, without allowing procedural-default rules to bar such review.

The Court of Appeals (1) acknowledging the existence of the ICJ's judgment, gave it no dispositive effect; and (2) denied the accused's application for a certificate of appealability, as the Court of Appeals (a) determined that the accused had procedurally defaulted, and (b) previously had held that the Convention did not create an individually enforceable right.

More than 2 months after the United States Supreme Court had granted certiorari in the instant case—to consider whether a federal court (1) was bound by the ICJ's ruling requiring United States courts to reconsider the accused's Convention claim, and (2) ought to give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment—and a month before oral argument in the case, the President of the United States issued a memorandum that the

United States would discharge its international obligations under the ICJ's decision by having state courts give effect to the ICJ's decision in accordance with general principles of comity in cases filed by the Mexican nationals addressed in the decision.

The accused, relying on the President's memorandum and the ICJ's judgment as separate bases for relief that were not available at the time of the accused's first state habeas corpus action, filed a successive state application for a writ of habeas corpus shortly before the scheduled date for oral argument in the Supreme Court.

On certiorari, the Supreme Court dismissed the writ of certiorari as improvidently granted. In a per curiam opinion expressing the views of REHNQUIST, Ch. J., and SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., it was held that dismissal was appropriate because (1) the pending state-court proceedings might provide the accused with the reconsideration of his Convention claim that he sought in the Supreme Court; and (2) the merits briefing in the instant case had revealed a number of hurdles that the accused would have been required to surmount before qualifying for habeas corpus relief in the federal proceeding on the bases of the questions presented to the Supreme Court.

GINSBURG, J., joined in pertinent part by SCALIA, J., concurring, expressed the view that the Supreme Court would have jurisdiction (1) to review the final judgment in the Texas proceedings; and (2) at that time, to rule definitively, if necessary, on the nation's obligation under the ICJ judgment.

O'CONNOR, J., joined by STEVENS, SOUTER, and BREYER, JJ., dissenting, expressed the view that (1) the Court of Appeals' denial of a certificate of appealability ought to be vacated; and (2) the case ought to be remanded for

resolution of whether (a) the ICJ's judgment was binding on American courts, (b) a particular provision of the Convention created a judicially enforceable individual right, and (c) another particular provision of the Convention sometimes required state procedural-default rules to be set aside so that the treaty could be given full effect.

SOUTER, J., dissenting, expressed the view that Supreme Court's best course in the instant case would have been to stay further action for a reasonable time while the Texas courts decided what to do, for in this way, the Supreme Court (1) would not have (a) wiped out the work already done in the case, or (b) decided issues that might turn out to require no action; but (2) would have remained in a position to address promptly, if necessary, the nation's obligation under the ICJ's judgment.

BREYER, J., joined by STEVENS, J., dissenting, expressed the view that (1) the Supreme Court ought to grant the accused's motion for a stay; but (2) in the absence of majority support for a stay, (a) the Court of Appeals' judgment ought to be vacated, and (b) the case ought to be remanded.

## COUNSEL

Donald F. Donovan argued the cause for petitioner.  
R. Ted Cruz argued the cause for respondent.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

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ARTHUR ANDERSEN LLP, Petitioner

v

UNITED STATES

544 US —, 161 L Ed 2d 1008, 125 S Ct 2129

[No. 04-368]

Argued April 27, 2005.

Decided May 31, 2005.

**Decision:** With respect to conviction of financially troubled corporation's auditor under some witness-tampering provisions (in 18 USCS § 1512(b), later amended), jury instructions held to have failed to convey properly elements of corrupt-persuasion conviction under § 1512(b).

## SUMMARY

Some federal witness-tampering provisions (in 18 USCS § 1512(b), later amended) made it a crime to "knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding."

A financially troubled corporation's auditor was indicted for allegedly violating these provisions, by directing the auditor's employees to destroy documents pursuant to the auditor's document-retention policy. With respect to the jury instructions at the auditor's subsequent trial in United States District Court for the Southern District of Texas, (1) the jury was told (a) that even if the auditor had believed that its conduct was lawful, the jury could find the auditor guilty, and (b) to

convict if the jury found that the auditor had intended to “subvert, undermine, or impede” governmental factfinding by suggesting to the auditor’s employees that they enforce the document-retention policy; and (2) the instructions assertedly did not require a “nexus” between the persuasion to destroy documents and any particular proceeding. The jury returned a guilty verdict. The District Court then denied a motion by the auditor for a judgment of acquittal.

On appeal, the United States Court of Appeals for the Fifth Circuit, in affirming the auditor’s conviction, expressed the view that (1) the jury instructions had properly conveyed the meaning of “corruptly persuad[e]” and “official proceeding”; (2) the jury had not needed to find any consciousness of wrongdoing; and (3) there had been no reversible error (374 F3d 281).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by REHNQUIST, Ch. J., expressing the unanimous view of the court, it was held that the jury instructions had failed to convey properly the elements of a corrupt-persuasion conviction under § 1512(b), as:

- (1) The Supreme Court’s traditional restraint in assessing the reach of a federal criminal statute was particularly appropriate in this case, where the act underlying the conviction—persuasion—was by itself innocuous under ordinary circumstances.
- (2) Whatever the outer limits of the Supreme Court’s conclusion that in § 1512(b), “knowingly” modified “corruptly persuad[e],” the jury instructions had failed to convey the requisite consciousness of wrongdoing.
- (3) The jury instructions had led the jury to believe

that it did not have to find any nexus between the persuasion to destroy documents and any particular proceeding.

### **COUNSEL**

Maureen E. Mahoney argued the cause for petitioner.

Michael R. Dreeben argued the cause for respondent.

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JON B. CUTTER, et al., Petitioners

v

REGINALD WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, et al.

544 US —, 161 L Ed 2d 1020, 125 S Ct 2113

[No. 03-9877]

Argued March 21, 2005.

Decided May 31, 2005.

**Decision:** In litigation involving prison inmates, § 3 of Religious Land Use and Institutionalized Persons Act of 2000 (42 USCS § 2000cc-1) held to qualify, on its face, as permissible legislative accommodation of religion that was not barred by Federal Constitution's First Amendment clause prohibiting establishment of religion.

## SUMMARY

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) (42 USCS § 2000cc-1) provided that no (covered) government could impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the burden furthered a compelling governmental interest and did so by the least restrictive means. Also, § 3 said that it applied when the substantial burden on religious exercise was imposed in a program or activity that received federal financial assistance.

The state of Ohio accepted federal funding for the state's prisons. Some state prison inmates brought suits,

eventually consolidated in the United States District Court for the Southern District of Ohio, against state prison officials. After RLUIPA's enactment, the inmates amended their complaints to include claims under § 3. The defendant officials moved to dismiss on grounds including an assertion that § 3 violated the Federal Constitution's First Amendment clause prohibiting an establishment of religion. Pursuant to 28 USCS § 2403(a), the United States intervened to defend RLUIPA's constitutionality. The District Court, in adopting the report and recommendation of a Magistrate Judge, rejected the argument that § 3 conflicted with the establishment clause (221 F Supp 2d 827).

On interlocutory appeal, the United States Court of Appeals for the Sixth Circuit, in reversing and in ordering a remand, expressed the view that § 3 violated the establishment clause, on the basis that § 3 impermissibly advanced religion by giving greater protection to religious rights than to other constitutionally protected rights (349 F3d 257, 2003 FED App 397P).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by GINSBURG, J., expressing the unanimous view of the court, it was held that § 3 qualified, on its face, as a permissible legislative accommodation of religion that was not barred by the First Amendment's establishment clause, as:

(1) Section 3 (a) alleviated exceptional government-created burdens on private religious exercise; and (b) protected institutionalized persons who were (i) unable freely to attend to their religious needs, and (ii) therefore, dependent on the government's permission and accommodation for the exercise of religion.

(2) Courts, in properly applying § 3, were required (a) to take adequate account of the burdens which a requested accommodation might impose on nonbeneficiaries; and (b) to be satisfied that § 3's prescriptions

were, and would be, administered neutrally among different faiths.

(3) The Supreme Court did not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety.

(4) The Supreme Court saw no reason to anticipate that abusive prisoner litigation would overburden the operations of state and local institutions.

THOMAS, J., concurring, (1) agreed that § 3 was constitutional under the Supreme Court's modern case law concerning the establishment clause; and (2) expressed the view that a proper historical understanding of the establishment clause as a federalism provision led to the same conclusion.

## COUNSEL

Paul D. Clement argued the cause for the United States.

David Goldberger argued the cause for petitioners.

Douglas R. Cole argued the cause for respondents.

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ULYSSES TORY, et al., Petitioners

v

JOHNNIE L. COCHRAN, Jr.

544 US —, 161 L Ed 2d 1042, 125 S Ct 2108

[No. 03-1488]

Argued March 22, 2005.

Decided May 31, 2005.

**Decision:** Permanent injunction issued by California court, prohibiting individuals from continuing activity that court had found to defame attorney, held not mooted by attorney's death, where his widow was substituted as party.

## SUMMARY

In a state-law defamation action brought by an attorney against an individual who asserted that the attorney owed the individual money, the Superior Court of California determined that the individual—with the help of a second individual—had engaged in unlawful defamatory activity, as the Superior Court found that (1) the assertion that the attorney owed the first individual money was false, and (2) the first individual had engaged in a continuous pattern of defamatory activity, including picketing the attorney's office and pursuing the attorney while chanting threats and insults, that was intended to coerce the attorney money to which the individual was not entitled.

After noting that the first individual had indicated that he would continue to engage in the activity in question in the absence of a court order, the Superior Court issued a permanent injunction prohibiting the

two individuals and others from such activity. On appeal, the California Court of Appeals affirmed. The United States Supreme Court granted the two individuals' petition for a writ of certiorari concerning the issue whether the injunction violated the free-speech provision of the Federal Constitution's First Amendment.

After oral argument in the Supreme Court, (1) the attorney's counsel (a) informed the Supreme Court of the attorney's recent death, (b) moved to substitute the attorney's widow for the attorney as a party in the case, and (c) suggested that the case be dismissed as moot. The two individuals who were seeking dismissal of the injunction (1) agreed to the substitution, but (1) contended that the case was not moot.

On certiorari, the Supreme Court granted the substitution motion, vacated, and remanded. In an opinion by BREYER, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., it was held that the case was not moot, as the injunction remained in effect, for (1) nothing in the injunction's language said to the contrary; (2) the parties had not identified, nor had the Supreme Court found, any source of California law that said the injunction automatically became invalid upon the attorney's death; (3) the attorney's counsel, pointing to the value of the attorney's law practice, asserted that the widow had an interest in enforcing the injunction; (4) as the Supreme Court understood California law, a person could not definitively know whether an injunction was legally void until a court had ruled that it was; and (5) given the uncertainty of the state's law, the Supreme Court took it as given that the injunction continued significantly to restrain the alleged defamers' speech.

THOMAS, J., joined by SCALIA, J., dissenting, expressed the view that the writ of certiorari that the Supreme

Court had granted in the case at hand ought to be dismissed as improvidently granted, for, regardless of whether the attorney's death mooted the case, it rendered the case an inappropriate vehicle for resolving the question presented: whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violated the First Amendment.

### **COUNSEL**

Erwin Chemerinsky argued the cause for petitioners.  
Jonathan B. Cole argued the cause for respondent.

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ALBERTO R. GONZALES, ATTORNEY GENERAL, et al., Petitioners

v

ANGEL MCCLARY RAICH et al.

545 U.S. —, 162 L. Ed. 2d 1, 125 S. Ct. 2195

[No. 03-1454]

Argued November 29, 2004.

Decided June 6, 2005.

**Decision:** Controlled Substances Act's (21 U.S.C.S. §§ 801 et seq.) prohibition of marijuana manufacture and possession, as applied to intrastate manufacture and possession for medical purposes under California law, held not to exceed Congress' power under Federal Constitution's commerce clause (Art. I, § 8, cl. 3).

## SUMMARY

The federal Controlled Substances Act (CSA) (Title II of the Comprehensive Drug Abuse Prevention and Control Act) (21 U.S.C.S. §§ 801 et seq.) generally criminalized the manufacture, distribution, or possession of marijuana. Although marijuana sale or possession also was generally prohibited under California criminal law, California enacted in 1996 a statute that created an exemption from criminal prosecution for marijuana possession under state law for (1) physicians who recommended marijuana to patients for medical purposes; and (2) patients, and their primary caregivers, who possessed or cultivated marijuana for patients' personal medical purposes upon recommendation or approval by a physician.

Two medical patients—California residents who used physician-recommended marijuana for serious medical conditions—brought, in the United States District Court for the Northern District of California, an action seeking injunctive and declaratory relief prohibiting the enforcement of the CSA to the extent that it prevented the patients from possessing, obtaining, or manufacturing marijuana for their personal medical use, on the asserted grounds that enforcing the CSA against the patients would violate the Federal Constitution's commerce clause (Art. I, § 8, cl. 3) and other constitutional provisions.

The District Court denied patients' motion for a preliminary injunction (248 F. Supp. 2d 918). However, the United States Court of Appeals for the Ninth Circuit reversed the District Court's judgment and ordered the District Court to enter a preliminary injunction, as the Court of Appeals concluded that the patients had demonstrated a strong likelihood of success on their claim that the CSA—as applied to the intrastate, noncommercial cultivation and possession of marijuana for personal medical purposes as recommended by a patient's physician pursuant to valid California law—exceeded Congress' authority under the commerce clause (352 F. 3d 1222).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by STEVENS, J., joined by KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., it was held that the CSA's categorical prohibition of the manufacture and possession of marijuana, did not, as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to the California statute, exceed Congress' authority under the commerce clause, as (1) Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would affect interstate price and

market conditions, where production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market for marijuana; (2) findings in the CSA's introductory sections explained why Congress had deemed it appropriate to encompass local activities within the CSA's scope; and (3) the circumstance that the CSA ensnared some purely intrastate activity was of no moment.

SCALIA, J., concurring in the judgment, expressed the view that (1) activities that merely substantially affect interstate commerce are not part of interstate commerce, and thus the power to regulate them cannot come from the commerce clause alone; (2) Congress' regulatory authority over intrastate activities that are not part of interstate commerce derives from the Constitution's necessary and proper clause (Art. I, § 8, cl. 18); and (3) where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not substantially affect interstate commerce.

O'CONNOR, J., joined in pertinent part by REHNQUIST, Ch. J., and THOMAS, J., dissenting, expressed the view that (1) the Supreme Court's decision in the instant case sanctioned an application of the CSA that extinguished California's experiment without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, had a substantial effect on interstate commerce and was therefore an appropriate subject of federal regulation; (2) in so doing, the court announced a rule that gave Congress an incentive to legislate broadly pursuant to the commerce clause, rather than with precision; and (3) that rule and the result it produced in the instant case were irreconcilable with prior Supreme Court decisions.

THOMAS, J., dissenting, expressed the view that (1) the local cultivation and consumption of marijuana by the two patients was not commerce among the several states; (2) the CSA, as applied to the patients' conduct in question, was not necessary and proper for carrying into execution Congress' restrictions on the interstate drug trade; and (3) therefore, neither the commerce clause nor the necessary and proper clause granted Congress the power to regulate the patients' conduct in question.

### COUNSEL

Paul D. Clement argued the cause for petitioners.  
Randy E. Barnett argued the cause for respondents.

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STATE of ALASKA, Plaintiff

v

UNITED STATES of AMERICA

545 U.S. —, 162 L. Ed. 2d 57, 125 S. Ct. 2137

[No. 128, Orig.]

Argued January 10, 2005.

Decided June 6, 2005.

**Decision:** In original proceeding between state of Alaska and United States concerning title to certain submerged lands underlying waters located in southeast Alaska, state's exceptions to Special Master's report overruled.

## SUMMARY

The state of Alaska had a dispute with the United States over the title to certain submerged lands underlying waters located in southeast Alaska. In order to resolve this dispute, the state initiated an original proceeding against the United States in the United States Supreme Court, by filing a complaint with leave of the court (530 U.S. 1228, 147 L. Ed. 2d 272, 120 S. Ct. 2681). The court appointed a Special Master (531 U.S. 941, 148 L. Ed. 2d 271, 121 S. Ct. 337). Also, the state amended its complaint. After considering the parties' submissions, the Special Master issued a report which recommended a grant of summary judgment to the United States with respect to all the submerged lands in dispute.

On exceptions by Alaska to the Special Master's report, the Supreme Court (1) overruled the state's exceptions; (2) directed the parties to prepare, and to

submit to the Special Master, an appropriate proposed decree for the court's consideration; and (3) retained jurisdiction. In an opinion by KENNEDY, J., expressing the unanimous view of the court as to holding 1 below, and joined by STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., as to holding 2 below, it was held that: (1) With respect to some pockets and enclaves of submerged lands underlying waters in between and fringing the southeastern Alaska islands known as the Alexander Archipelago—all parts of which pockets and enclaves were more than 3 nautical miles from the coast of the mainland or of any individual island of the Alexander Archipelago—the waters in question (a) did not qualify as inland waters (so as to give rise to a presumption of state title to these submerged lands) under either of the state's two theories concerning (i) historic inland waters, and (ii) juridical bays; and (b) thus, instead qualified as territorial sea, so that the state had no valid claim of title to the disputed pockets and enclaves.

(2) Even though there was a strong presumption that title to the submerged lands underlying the waters of Glacier Bay National Monument (later Glacier Bay National Park) had passed to Alaska at statehood in 1959, the United States had successfully rebutted this presumption, as (a) the Monument, at the time of Alaska's statehood, had included the submerged lands underlying Glacier Bay; and (b) some provisions of the Alaska Statehood Act (note preceding 48 U.S.C.S. § 21) had sufficed to reserve these submerged lands to the United States.

SCALIA, J., joined by REHNQUIST, Ch. J., and THOMAS, J., concurring in part and dissenting in part, (1) agreed with much of the Supreme Court's views, but (2) expressed the view that neither text, nor context, nor precedent compelled the conclusion that the United

States had expressly retained title to the submerged lands within Glacier Bay National Monument at the time of Alaskan statehood.

### **COUNSEL**

Jonathan S. Franklin argued the cause for plaintiff.  
Jeffrey P. Minear argued the cause for defendant.

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DOUGLAS SPECTOR, et al., Petitioners

v

NORWEGIAN CRUISE LINE LTD.

545 U.S. —, 162 L. Ed. 2d 97, 125 S. Ct. 2169

[No. 03-1388]

Argued February 28, 2005.

Decided June 6, 2005.

**Decision:** Federal Court of Appeals' broad ruling that Title III of Americans with Disabilities Act of 1990 (42 U.S.C.S. §§ 12181 et seq.) was inapplicable to foreign-flag cruise ships in United States waters held erroneous.

## SUMMARY

A Bermuda corporation with a principal place of business in Florida operated cruise ships that departed from, and returned to, ports in the United States. The ships were essentially floating resorts that provided passengers with staterooms or cabins, food, and entertainment. Some disabled cruise passengers and their companions—alleging, among other matters, that physical barriers on two of the company's Bahamas-registered ships had denied the disabled passengers access to various facilities—filed a class action in the United States District Court for the Southern District of Texas. The plaintiffs sought declaratory and injunctive relief under various provisions of Title III of the Americans with Disabilities Act of 1990 (42 U.S.C.S. §§ 12181 et seq.), including those that (1) prohibited discrimination based on disability in places of “public accommodation” (42 U.S.C.S. § 12182(a)) and in

“specified public transportation services” (42 U.S.C.S. § 12184(a)); and (2) required covered entities to remove architectural barriers and communication barriers that were structural in nature, where such removal was “readily achievable” (42 U.S.C.S. §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C)).

The District Court, although ruling that foreign-flag cruise ships were generally subject to Title III, dismissed the plaintiffs’ claims concerning removal of physical barriers, on the ground that the federal agencies charged with promulgating ADA architectural and structural guidelines had not done so for cruise ships. The United States Court of Appeals for the Fifth Circuit, in affirming in pertinent part, concluded that general statutes such as Title III did not apply, absent a clear indication of congressional intent, to foreign-flag vessels in United States territory (356 F.3d 641).

On certiorari, the United States Supreme Court reversed and remanded. In that part of an opinion by KENNEDY, J., which constituted the opinion of the court and was joined by STEVENS, SOUTER, GINSBURG, and BREYER, JJ., it was held that:

(1) Although, in some circumstances, a general statute will not apply, absent a clear statement of congressional intent, to certain aspects of the internal operations of foreign vessels temporarily in United States waters, the Court of Appeals’ broad clear-statement rule as to the applicability of Title III to foreign-flag cruise ships was inconsistent with the Supreme Court’s case law and with sound principles of statutory interpretation.

(2) The cruise ships in question fell within Title III’s definitions of “public accommodation” and “specified public transportation.”

(3) A barrier removal on a vessel would not be “readily achievable” for purposes of Title III if such removal would (a) bring the vessel into noncompliance with the

International Convention for the Safety of Life at Sea (32 U.S.T. 47, T.I.A.S. No. 9700) or with any other international legal obligation, or (b) pose a direct threat to the health or safety of others.

In addition, KENNEDY, J., joined by STEVENS, SOUTER, and THOMAS, JJ., expressed the view that (1) if Title III imposed a requirement that interfered with a foreign-flag cruise ship's internal affairs, then the clear-statement rule would come into play, but such a requirement would still apply to domestic ships; and (2) Title III requirements having nothing to do with internal affairs would continue to apply to domestic and foreign ships alike.

Also, KENNEDY, J., joined by STEVENS and SOUTER, JJ., expressed the view that (1) although some of the plaintiffs' Title III allegations had nothing to do with a ship's internal affairs, the allegations concerning physical barriers appeared to involve requirements that might be construed as relating to such internal affairs; and (2) the clear-statement rule would most likely come into play if Title III were read to require permanent and significant structural modifications to foreign vessels; but (3) it was possible that Title III did not require any such modifications that would interfere with cruise ships' internal affairs.

GINSBURG, J., joined by BREYER, J., concurring in part and concurring in the judgment, (1) agreed that Title III covered cruise ships and allowed them to resist structural modifications that would conflict with international legal obligations; but (2) expressed the view that the clear-statement rule ought not to block modifications prompted by Title III that were (a) "readily achievable" as not conflicting with international legal obligations, but (b) interfered with a foreign ship's internal affairs.

THOMAS, J., concurring in part, dissenting in part, and concurring in the judgment in part, expressed the view that (1) the clear-statement rule did not render Title III entirely inapplicable to foreign vessels, (2) Title III applied to foreign ships only to the extent to which Title III did not bear on such ships' internal affairs, and (3) remand was necessary for consideration of those Title III claims that did not pertain to the structure of the ships in question.

SCALIA, J., joined by REHNQUIST, Ch. J., and O'CONNOR, J., and joined in part (as to point 1 below) by THOMAS, J., dissenting, expressed the view that (1) Congress had to express clearly an intent to apply its laws to foreign-flag ships when those laws interfered with a ship's internal order; (2) a clear statement was required to apply any part of Title III to foreign-flag ships; and (3) because there was no clear statement of coverage, Title III did not apply to foreign-flag cruise ships in United States territorial waters.

## COUNSEL

Thomas C. Goldstein argued the cause for petitioners.

David B. Salmons argued the cause for the United States, as amicus curiae, by special leave of court.

David C. Frederick argued the cause for respondent.

Gregory G. Garre argued the cause for The Bahamas, as amicus curiae, supporting the respondent.

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JAY SHAWN JOHNSON, Petitioner

v

CALIFORNIA

545 U.S. —, 162 L. Ed. 2d 129, 125 S. Ct. 2410

[No. 04-6964]

Argued April 18, 2005.

Decided June 13, 2005.

**Decision:** California's "more likely than not" standard for establishing prima facie case of group bias in peremptory challenges during jury selection held to be at odds with prima facie inquiry mandated under equal-protection principles of *Batson v. Kentucky* (1986) 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

## SUMMARY

After removal of a number of prospective jurors for cause during jury selection—for a criminal trial in a California state court of a black accused who was charged with assaulting and murdering a white child—left 43 eligible jurors remaining, the prosecutor used 3 of his 12 peremptory challenges to remove the 3 of the 43 prospective jurors who were black. Defense counsel objected to those strikes on the asserted ground that they were based on race in violation of both the California constitution and the Federal Constitution. However, the trial judge, without asking the prosecutor to explain his strikes, found that the accused had failed to establish a prima facie case of

purposeful discrimination under governing state precedent. The accused was convicted of assault and murder.

The California Court of Appeal, concluding that the accused produced sufficient evidence to support a prima facie case of race discrimination, set aside the accused's conviction (88 Cal. App. 4th 318, 105 Cal. Rptr. 2d 727).

However, the California Supreme Court (1) held that (a) *Batson v. Kentucky* (1986) 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712—providing that a prima facie case of race discrimination, in violation of the equal protection clause of the Federal Constitution's Fourteenth Amendment, in a peremptory strike of a prospective juror could be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gave rise to an inference of discriminatory purpose—permitted state courts to establish the standards used to evaluate the sufficiency of prima facie cases of purposeful discrimination in jury selection, and (b) the state's standard, requiring a showing that it was more likely than not that the other party's unexplained peremptory challenges to potential jurors were based on impermissible group bias, was consistent with *Batson*; and (2) reinstated the accused's conviction (30 Cal. 4th 1302, 1 Cal. Rptr. 3d 1, 71 P.3d 270).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by STEVENS, J., joined by REHNQUIST, Ch. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., it was held that California's "more likely than not" standard for establishing a prima facie case of group bias in peremptory challenges during jury selection was at odds with the prima facie inquiry mandated under *Batson*, as: (1) *Batson*, on its own terms, provided no support for the state's standard, for in *Batson*, the United States

Supreme Court had not intended the first step, in the three-step process described in Batson for establishing illegal discrimination, to be the onerous "more likely than not" standard.

(2) The inherent uncertainty present in inquiries of discriminatory purpose counseled against engaging in needless and imperfect speculation, when a direct answer could be obtained by simply asking a prosecutor, under the second Batson step, to offer permissible race-neutral justifications for the strikes in question.

(3) The three-step process (a) served the public purposes that Batson was designed to vindicate; and (b) encouraged prompt rulings on objections to peremptory challenges.

(4) The disagreements among the state-court judges who had reviewed the record in the instant case illustrated the imprecision of relying on judicial speculation to resolve plausible claims of discrimination.

BREYER, J., concurring, maintained in the instant case the views that he set forth in his concurring opinion in *Miller-El v. Dretke* (2005) 545 U.S. —, 162 L. Ed. 2d 196, 125 S. Ct. —, which was decided on the same day as the instant case.

THOMAS, J., dissenting, expressed the view that (1) according to Batson, the equal protection clause required that prosecutors select juries on the basis of factors other than race, not that litigants bear particular burdens of proof or persuasion; (2) because Batson's burden-shifting approach was a prophylactic framework that policed racially discriminatory jury selection, rather than an independent constitutional command, states had wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult policy problems;

and (3) California's procedure concerning Batson fell within the state's broad discretion to craft its own rules of criminal procedure.

### COUNSEL

Stephen B. Bedrick argued the cause for petitioner.  
Seth K. Schalit argued the cause for respondent.

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MARGARET BRADSHAW, WARDEN, Petitioner

v

JOHN DAVID STUMPF

545 U.S. —, 162 L. Ed. 2d 143, 125 S. Ct. 2398

[No. 04-637]

Argued April 19, 2005.

Decided June 13, 2005.

**Decision:** Ohio state prisoner's guilty plea to Ohio charge of aggravated murder held not invalid, notwithstanding that prisoner—and prosecution at accomplice's trial—claimed that accomplice had killed victim; remand held necessary as to validity of death sentence.

## SUMMARY

An armed robbery in Ohio left a victim dead and the victim's husband wounded. An accused admitted to participating in the robbery and to shooting the husband, but denied shooting the victim. The accused agreed to plead guilty to aggravated murder and attempted aggravated murder, and the state dropped other charges against him. With respect to the aggravated murder charge, the accused pleaded guilty to one of three capital specifications and was thus eligible for the death penalty. In an Ohio Court of Common Pleas, a contested penalty hearing was held in which the accused's principal mitigation argument was that (1) he had participated in the plot only at the urging and under the influence of an alleged accomplice, and (2) the accomplice had fired the fatal shots at the victim. Nevertheless, the court sentenced the accused to death.

Subsequently, the accomplice was tried in the same court. Although the prosecutor claimed that the accomplice was the principal offender in the murder, the accomplice argued that the same prosecutor had taken a contrary position in the accused's case. A jury sentenced the accomplice to life imprisonment.

The Court of Common Pleas denied the accused's motion to withdraw his guilty plea or vacate his death sentence, and the denial was ultimately affirmed by the Supreme Court of Ohio (32 Ohio St. 3d 95, 512 N.E.2d 598, cert. den. 484 U.S. 1079, 98 L. Ed. 2d 1022, 108 S. Ct. 1060). In 1995, after the accused's request for state postconviction relief had been denied by the state courts, the accused filed a federal habeas corpus petition in the United States District Court for the Southern District of Ohio, which denied relief.

The United States Court of Appeals for the Sixth Circuit, in reversing, concluded that (1) the guilty plea was invalid as not having been entered knowingly and intelligently, for the accused had pleaded guilty to aggravated murder without understanding that specific intent to cause death was a necessary element of the charge under Ohio law; and (2) both the guilty plea and the death sentence had to be set aside, because the accused's due process rights had been violated when the state, using inconsistent theories, secured convictions of the accused and the accomplice for the same crime (367 F. 3d 594).

On certiorari, the United States Supreme Court reversed in part, vacated in part, and remanded. In an opinion by O'CONNOR, J., expressing the unanimous view of the court, it was held that:

(1) The Court of Appeals had erred in concluding that the accused's guilty plea was not knowing, voluntary, and intelligent, for among other matters, (a) the accused's choice to plead guilty to aggravated murder

was not inconsistent with his denial of having shot the victim, as the aggravated-murder charge's element of specific intent did not require any showing, under Ohio law, that the accused himself had shot the victim; and (b) the alleged shortcomings of the deal that the accused had obtained in pleading guilty would have cast doubt on the validity of his plea only if such shortcomings had shown that he (i) had made the plea on the constitutionally defective advice of counsel, a claim which was not before the United States Supreme Court in the case at hand, or (ii) could not have understood the terms of the bargain, a claim which could not be accorded much weight under the circumstances presented.

(2) The Court of Appeals additionally had erred in concluding that prosecutorial inconsistencies between the accused's case and that of his accomplice required voiding the accused's guilty plea, for among other matters, the accused had never provided an explanation of how the prosecution's postplea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea.

(3) Remand was necessary as to the issue of the validity of the accused's death sentence, for (a) it was not clear whether the Court of Appeals would have concluded that the prisoner was entitled to resentencing if the Court of Appeals had not also considered the conviction invalid; and (b) the Court of Appeals ought to have the opportunity to consider, in the first instance, the question of how some testimony and the prosecutor's conduct in the accused's and accomplice's cases related to the accused's sentence in particular.

SOUTER, J., joined by GINSBURG, J., concurring, expressed the view that the issue that was being remanded for further consideration was whether a death sentence could be allowed to stand when the sentence had been

imposed in response to a factual claim that the prosecution had necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant.

THOMAS, J., joined by SCALIA, J., concurring, expressed the view that (1) the state, in supporting the death sentence on remand, would not be precluded from advancing the defenses that (a) the rule of *Teague v. Lane* (1989) 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060—against the retroactive application of a new rule of constitutional law in granting federal habeas corpus relief—foreclosed the accused's claim that the prosecution's presentation of inconsistent theories violated his right to due process, and (b) the accused had procedurally defaulted his due process claim; and (2) the accused had never explained how the prosecution's use of postsentence inconsistent arguments could have affected the reliability or procedural fairness of his death sentence.

### COUNSEL

Douglas R. Cole argued the cause for petitioner.  
Alan M. Freedman argued the cause for respondent.

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MERCK KGaA, Petitioner

v

INTEGRA LIFESCIENCES I, LTD., et al.

545 U.S. —, 162 L. Ed. 2d 160, 125 S. Ct. 2372

[No. 03-1237]

Argued April 20, 2005.

Decided June 13, 2005.

**Decision:** Patent-infringement exemption of 35 U.S.C.S. § 271(e)(1) held to protect, under some conditions, use of patented compounds in pre-clinical drug research where results of such research are not ultimately submitted to Food and Drug Administration.

## SUMMARY

Beginning in 1988, a drug company provided funding for research conducted by a scientist in the field of angiogenesis, a process by which new blood vessels sprout from existing vessels. The research included experiments with compounds known as RGD peptides to determine such peptides' efficacy as angiogenesis inhibitors and suitability as potential drugs.

Two entities that held patents on the peptides in question filed a patent-infringement suit in the United States District Court for the Southern District of California against the drug company, the scientist, and the research institute at which the scientist had worked. A jury found that (1) the defendants had infringed respondents' patents, and (2) the drug company had failed to show that its activities were protected by a provision of federal patent law (35 U.S.C.S. 206

§ 271(e)(1)) under which it was generally not an act of patent infringement to make, use, or sell a patented invention solely for uses reasonably related to the development and submission of information under a federal law regulating the manufacture, use, or sale of drugs. The District Court, in response to post-trial motions, affirmed the jury's damages award against the drug company.

The United States Court of Appeals for the Federal Circuit, in affirming in pertinent part, concluded that § 271(e)(1)'s safe harbor did not apply, as the research in question was not clinical testing to supply information to the Food and Drug Administration (FDA), but only general biomedical research to identify new pharmaceutical compounds (331 F.3d 860).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by SCALIA, J., expressing the unanimous view of the court, it was held that:

(1) The use of patented compounds in preclinical studies is protected under § 271(e)(1)—even where the results of such research are not ultimately included in a submission of information to the FDA—as long as there is a reasonable basis for believing that the experiments in question will produce the types of information that are relevant to (a) an investigational new drug application, which a drug maker must submit to the FDA, pursuant to a provision of the Federal Food, Drug, and Cosmetic Act (FDCA) (21 U.S.C.S. § 355(i)), when seeking authorization to conduct human clinical trials; or (b) a new drug application, which a drug maker must submit to the FDA, pursuant to another FDCA provision (21 U.S.C.S. § 355(b)(1)), when seeking authorization to market a new drug.

(2) Such use of patented compounds is protected in experimentation on drugs that are not ultimately the

subject of a submission to the FDA, at least where a drugmaker (a) has a reasonable basis for believing that a patented compound may work, through a particular biological process, to produce a particular physiological effect; and (b) uses the compound in research that, if successful, would be appropriate to include in a submission to the FDA.

(3) Remand was necessary in the case at hand, because the sufficiency of the evidence presented at trial had not yet been reviewed under the standards set forth in a jury instruction that was consistent with the Supreme Court's construction of § 271(e)(1).

#### COUNSEL

E. Joshua Rosenkranz argued the cause for petitioner.

Daryl Joseffer argued the cause for the United States, as amicus curiae, by special leave of court.

Mauricio A. Flores argued the cause for respondents.

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REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, et al., Petitioners

v

CHARLES E. AUSTIN et al.

545 U.S. —, 162 L. Ed. 2d 174, 125 S. Ct. 2384

[No. 04-495]

Argued March 30, 2005.

Decided June 13, 2005.

**Decision:** Ohio's procedures for determining whether to place prisoners in state's highest-security prison ("Supermax" facility) held to comply with due process requirements of Federal Constitution's Fourteenth Amendment.

## SUMMARY

"Supermax" prisons were maximum-security state and federal facilities with highly restrictive conditions that were designed to segregate the most dangerous prisoners from the general prison population. In Ohio's only Supermax facility, the Ohio State Penitentiary (OSP), (1) almost every aspect of an inmate's life was controlled and monitored; (2) incarceration was synonymous with extreme isolation; (3) opportunities for visitation were rare and were always conducted through glass walls; and (4) inmates were deprived of almost any environmental or sensory stimuli and of almost all human contact. Placement at OSP was for an indefinite period that was limited by only an inmate's

sentence. Moreover, inmates who were otherwise eligible for parole lost this eligibility while incarcerated at OSP.

Formal guidelines for determining whether to classify an inmate for placement in OSP were contained in a policy promulgated by Ohio in 2002 (new policy). Under the new policy, prison official conducted a classification review either (1) upon an inmate's entry into the prison system if the inmate had been convicted of certain offenses, such as organized crime; or (2) during the inmate's incarceration in a facility other than OSP if the inmate engaged in specified conduct, such as leading a prison gang.

Under a three-tier review process that the new policy required to be followed after a recommendation that an inmate be placed in OSP, (1) the inmate (a) had to receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal at a hearing, but was not allowed to call witnesses, and (b) was invited to submit objections prior to the final level of review; (2) although a subsequent reviewer could overturn an affirmative recommendation for OSP placement at any level, if one reviewer declined to recommend OSP placement, then the process terminated; and (3) it was required that (a) a placement review occur within 30 days of an inmate's initial assignment to OSP, and (b) an annual review be performed thereafter.

A class of current and former OSP inmates filed against various Ohio prison officials, under 42 U.S.C.S. § 1983 in the United States District Court for the Northern District of Ohio, a suit seeking declaratory and injunctive relief from the 2002 policy's predecessor (old policy) on the asserted basis that the old policy violated the due process clause of the Federal Constitu-

tution's Fourteenth Amendment. Prior to trial, Ohio promulgated the new policy.

The District Court determined that (1) the inmates had a liberty interest in avoiding assignment to OSP, and (2) the new policy did not meet the Fourteenth Amendment's procedural due process requirements (189 F. Supp. 2d 719). Moreover, in a separate order, the District Court directed some procedural modifications to the new policy (204 F. Supp. 2d 1024).

On appeal, the United States Court of Appeals for the Sixth Circuit in pertinent part (1) affirmed the District Court's determination that the inmates had a liberty interest in avoiding assignment to OSP; and (2) upheld the District Court's procedural modifications (372 F. 3d 346, 2004 FED App. 176P).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by KENNEDY, J., expressing the unanimous view of the court, it was held that the new policy provided sufficient procedural protection of the inmates' liberty interest to comply with the Fourteenth Amendment's due process requirements, as a balance of the three factors listed in *Mathews v. Eldridge* (1976) 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893, as requiring consideration in determining whether government procedures satisfied the Constitution's due process requirements—(1) the private interest that would be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail—yielded the conclusion that the new policy was adequate to safeguard the inmates' liberty

interest in not being assigned to the Supermax facility, for the state was not, for example, attempting to remove an inmate from free society for a specific parole violation, or to revoke good-time credits for specific and serious misbehavior, where more formal, adversary-type procedures might have been useful.

### **COUNSEL**

James M. Petro argued the cause for petitioners.

Deanne E. Maynard argued the cause for the United States, as amicus curiae, by special leave of court.

Jules Lobel argued the cause for respondents.

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THOMAS JOE MILLER-EL, Petitioner

v

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

545 U.S. —, 162 L. Ed. 2d 196, 125 S. Ct. 2317

[No. 03-9659]

Argued December 6, 2004.

Decided June 13, 2005.

**Decision:** Accused held entitled to prevail on federal habeas corpus claim that prosecutors in accused's Texas capital murder trial had made race-based peremptory strikes of potential jurors; relief ordered under 28 U.S.C.S. § 2254.

## SUMMARY

An accused was charged with capital murder and scheduled for a jury trial in a Texas state court. When the jury was being selected, the prosecution assertedly used peremptory challenges to exclude 91 percent of the eligible black venire members. However, the state trial court, under then-existing law, denied a motion by the accused to strike the jury on the accused's theory that the prosecution's use of peremptory challenges had allegedly violated the equal protection clause of the Federal Constitution's Fourteenth Amendment. The accused was convicted of capital murder and was sentenced to death.

While the accused's state-court appeal was pending, the United States Supreme Court decided *Batson v. Kentucky* (1986) 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct.

1712, which established a three-step process for evaluating a state criminal defendant's claim that a prosecutor has used a peremptory challenge in violation of the Fourteenth Amendment's equal protection clause. Under this process, (1) the defendant must make a *prima facie* showing that the peremptory challenge was exercised on the basis of race; (2) if that showing is made, then the prosecutor must offer a race-neutral basis for striking the juror in question; and (3) in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

The Court of Criminal Appeals of Texas remanded the accused's case for new findings in light of Batson. After a hearing, the state trial court again ruled against the accused, as the trial court determined that (1) the accused's evidence failed to satisfy Batson's first step; and (2) in any event, the state would have prevailed on Batson's second and third steps. The state appellate court denied the accused's resulting appeal, and the Supreme Court denied certiorari in 1993.

Subsequently, the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132) amended the habeas corpus statute codified at 28 U.S.C.S. §§ 2241 et seq., so that 28 U.S.C.S. § 2253 mandated that a state prisoner seeking habeas corpus relief under 28 U.S.C.S. § 2254 had no automatic right to appeal a Federal District Court's denial of such relief. Instead, the prisoner first had to seek and obtain a certificate of appealability (COA). Also, under 28 U.S.C.S. § 2253(c)(2), a prisoner seeking a COA had to demonstrate a substantial showing of the denial of a federal constitutional right.

Meanwhile, after the accused in the instant case was unsuccessful in state habeas corpus proceedings, he (1) sought federal habeas corpus relief in the United States District Court for the Northern District of Texas, and

(2) included a jury-selection claim based on Batson. The District Court adopted a United States Magistrate Judge's recommendation that the accused be denied relief. The accused sought a COA from the District Court, which denied the application. The accused then renewed his request with the United States Court of Appeals for the Fifth Circuit, which also denied a COA (261 F. 3d 445).

On certiorari, the Supreme Court, reversing and remanding, held that the merits of the accused's Batson claim were at least debatable, so that the Court of Appeals should have issued a COA (537 U.S. 322, 154 L. Ed. 2d 931, 123 S. Ct. 1029). The Court of Appeals granted the accused a COA, but rejected his claim on the merits (361 F. 3d 849).

Again on certiorari, the Supreme Court reversed and remanded. In an opinion by SOUTER, J., joined by STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., it was held that the accused was entitled to prevail on his federal habeas corpus claim that the prosecutors in his trial had made race-based peremptory strikes of potential jurors, in violation of the Fourteenth Amendment's equal protection clause—and thus, relief for the accused was ordered under § 2254—as:

(1) The prosecutors had used their peremptory strikes to exclude 91 percent of the eligible black venire members. Happenstance was unlikely to have produced this disparity.

(2) Evidence indicated that race had been significant in peremptory strikes of two particular black venire members.

(3) More broadly, (a) the prosecution's shuffling of the venire panel, its inquiry into views on the death penalty, and its questioning about minimum acceptable sentences all indicated decisions that probably had been based on race; and (b) the appearance of discrimina-

tion was confirmed by widely known evidence of the general policy of the local district attorney's office to exclude black venire members from juries at the time the accused's jury was selected.

(4) Viewed cumulatively, the direction of the evidence was too powerful to conclude anything but discrimination.

BREYER, J., concurring, expressed the view that (1) the instant case suggested the need to confront the choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily; and (2) it was necessary to reconsider (a) the Batson test, and (b) the peremptory challenge system as a whole.

THOMAS, J., joined by REHNQUIST, Ch. J., and SCALIA, J., dissenting, expressed the view that in the instant case, the Supreme Court relied on evidence that (1) never had been presented to the Texas state courts; (2) did not clearly and convincingly show that the state had racially discriminated against potential jurors; and (3) ought not even to have been considered by the Supreme Court, as in deciding whether to grant the accused relief, the court, under 28 U.S.C.S. § 2254(d)(2), ought to have looked only to the evidence presented in the state-court proceeding.

## COUNSEL

Seth P. Waxman argued the cause for petitioner.  
Gena Bunn argued the cause for respondent.

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GRABLE & SONS METAL PRODUCTS, INC., Petitioner

v

DARUE ENGINEERING & MANUFACTURING

545 U.S. —, 162 L. Ed. 2d 257, 125 S. Ct. 2363

[No. 04-603]

Argued April 18, 2005.

Decided June 13, 2005.

**Decision:** National interest in providing federal forum for federal tax litigation held sufficiently substantial to support exercise of federal-question jurisdiction over disputed issue—concerning notice of tax-delinquency seizure—on removal of quiet-title action from Michigan court to Federal District Court.

## SUMMARY

After the Internal Revenue Service (IRS) had seized some real property in Michigan from a company in order to satisfy an asserted tax delinquency, a second company obtained the property at a federal tax sale. The first company (1) brought, in a Michigan state court, a quiet-title action; and (2) alleged that the second company's record title was invalid on the theory that the IRS had not given adequate notice, within the meaning of 26 U.S.C.S. § 6335(a), when the IRS had seized the property.

The second company, which—for purposes of federal diversity-of-citizenship jurisdiction—apparently was nondiverse from the first company, removed the quiet-title action to the United States District Court for the

Western District of Michigan, under 28 U.S.C.S. § 1441, as purportedly presenting a federal question within the meaning of 28 U.S.C.S. § 1331. The District Court (1) declined to remand the case, finding a significant question of federal law; (2) ruled that the first company's lack of a federal right of action to enforce a title claim against the second company did not bar the exercise of federal jurisdiction; and (3) eventually, on the merits, granted summary judgment to the second company (207 F. Supp. 2d 694).

On appeal, the United States Court of Appeals for the Sixth Circuit, in affirming, (1) expressed the view, on the jurisdictional question, that it sufficed that the quiet-title claim (a) raised an issue of federal law that had to be resolved, and (b) implicated a substantial federal interest; and (2) on the merits, upheld the District Court (377 F. 3d 592, 2004 FED App. 244P).

The United States Supreme Court—having granted certiorari limited to the jurisdictional question—affirmed. In an opinion by SOUTER, J., expressing the unanimous view of the court, it was held that the national interest in providing a federal forum for federal tax litigation was sufficiently substantial to support the exercise of federal-question jurisdiction over the disputed notice issue on the removal of the quiet-title action to the District Court, for:

- (1) The question whether the first company had been given notice within the meaning of § 6335(a) was an essential element of the first company's claim of superior title.
- (2) The meaning of § 6335(a) was (a) actually in dispute, and (b) an important issue of federal law that sensibly belonged in a federal court.
- (3) The recognition of federal-question jurisdiction in the case at hand was consistent with prior Supreme Court quiet-title cases.

(4) Removal was not precluded by the want of a federal-law quiet-title cause of action that could have been brought against the second company.

THOMAS, J., concurring, expressed the view that—while the Supreme Court had faithfully applied its precedents interpreting § 1331—in an appropriate case, he would be prepared to reconsider the Supreme Court's interpretation of § 1331 as authorizing federal-court jurisdiction over some cases in which state law created the cause of action but the determination of an issue of federal law was required.

### COUNSEL

Eric H. Zagrans argued the cause for petitioner.  
Michael C. Walton argued the cause for respondent.  
Irving L. Gornstein argued the cause for the United States, as amicus curiae, by special leave of court.

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SAN REMO HOTEL, L. P., et al., Petitioners

v

CITY and COUNTY OF SAN FRANCISCO, CALIFORNIA, et al.

545 U.S. —, 162 L. Ed. 2d 315, 125 S. Ct. 2491

[No. 04-340]

Argued March 28, 2005.  
Decided June 20, 2005.

**Decision:** Exception to 28 U.S.C.S. § 1738 (which generally required federal courts to give full faith and credit to state judicial proceedings) held not created with respect to some takings claims, under Federal Constitution's Fifth Amendment and 42 U.S.C.S. § 1983, by owners of hotel.

## SUMMARY

With respect to federal-court takings claims under the Federal Constitution's Fifth Amendment, a ripeness rule of Williamson County Reg'l Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108, generally required plaintiffs first to request state courts for compensation under state law. Moreover, 28 U.S.C.S. § 1738 generally required federal courts to give full faith and credit to state judicial proceedings. However, the United States Supreme Court held in *England v. Louisiana State Bd. of Medical Examiners* (1964) 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461, that—at least in some instances—when a federal court abstained from deciding a federal constitutional issue to enable the state courts to address an antecedent state-law issue, a plaintiff could reserve the

right to return to federal court for the disposition of the plaintiff's federal claims.

The owners of a hotel in a California city sought to challenge a \$567,000 fee imposed, purportedly pursuant to a city ordinance, for allegedly converting residential hotel units to tourist units. After a city board rejected the owners' appeal, the owners filed in California Superior Court for a writ of administrative mandamus. However, that action lay dormant for several years. The parties ultimately agreed to stay that action after the owners filed for relief in the United States District Court for the Northern District of California.

In the owners' District Court suit against defendants including the city, the owners' amended complaint (1) asserted multiple claims, including facial and as-applied takings claims under the Fifth Amendment; and (2) in one count, sought damages under 42 U.S.C.S. § 1983. However, the District Court granted the defendants summary judgment, as, with respect to the owners' takings claims, the District Court (1) found the facial claims to be untimely under the applicable statute of limitations, and (1) the as-applied takings claims to be unripe under the Williamson County rule.

On appeal, the United States Court of Appeals for the Ninth Circuit (1) without answering the limitations issue concerning the facial takings claims, (a) held that these claims were ripe, and (b) agreed to the owners' request to abstain under the doctrine of Railroad Com. of Texas v. Pullman Co. (1941) 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643, on the basis that a return to state court could conceivably moot the remaining federal questions; (2) held that the owners' as-applied takings claims were unripe under Williamson County, on the basis that the owners had failed to pursue a compensation action in state court; and (3) expressed the view

that the owners would have to make an appropriate reservation in state court if the owners wanted to retain the right to return to federal court for adjudication of the owners' federal claims (145 F.3d 1095).

The owners reactivated the dormant state-court case. The state trial court dismissed the owners' amended complaint, but an intermediate appellate court reversed. The California Supreme Court, in reversing in pertinent part, (1) expressed the view that—while the owners had sought relief only under state law—the owners' takings claim would be analyzed under the relevant decisions of both the California Supreme Court and the United States Supreme Court; and (2) upheld the hotel-conversion ordinance on its face and as applied to the owners (27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P. 3d 87).

The owners then returned to the District Court, by filing an amended complaint based on the complaint which they had filed prior to invoking Pullman abstention. However, with respect to the owners' takings claims, the District Court (1) held that the facial claims were barred not only by the statute of limitations, but also by the general rule, under § 1738, of issue preclusion; (2) expressed the view that most of the as-applied claims amounted to nothing more than improperly-labeled facial challenges; and (3) held that the remaining as-applied claims were barred by the statute of limitations.

The Court of Appeals, in affirming, (1) found itself bound to apply general issue-preclusion doctrine; and (2) held that the District Court had properly applied this doctrine (364 F.3d 1088).

On certiorari, the United States Supreme Court affirmed. In an opinion by STEVENS, J., joined by SCALIA, SOUTER, GINSBURG, and BREYER, J., it was held—assuming, for the purposes of decision, that

various other issues had been correctly decided below—that no exception to § 1738's requirements of full faith and credit would be created with respect to the hotel owners' federal takings claims, even though the owners assertedly had reactivated the state-court proceeding in order to ripen those takings claims, as: (1) The Supreme Court's limited England holding did not support any attempt by the owners, upon returning to federal court in the case at hand, to relitigate issues decided by the state courts, where (a) with respect to the owners' ripe facial claims, the owners had (i) chosen, in the state-court proceeding, to advance broader issues, and (ii) effectively asked the state court to resolve the same federal issues which the owners had asked the state court to reserve; and (b) the owners' unripe as-applied claims had not been properly before the District Court prior to the reactivation of the state-court proceeding.

(2) The owners were not persuasive in their more general argument that federal courts ought not to apply ordinary preclusion rules to state-court judgments when a takings case was forced into state court by the Williamson County compensation-ripeness rule, where (a) the owners' preference for a federal forum did not matter for federal constitutional or statutory purposes; (b) Congress had not expressed any intent to exempt federal takings claims from § 1738; and (c) with respect to the owners' facial takings claims, the owners had not had the right to seek state-court review of the same substantive issues which the owners had sought to reserve.

REHNQUIST, Ch. J., joined by O'CONNOR, KENNEDY, and THOMAS, JJ., concurring in the judgment, expressed the view that (1) whatever the reasons for the owners' chosen course of litigation in the state courts, the owners were precluded by § 1738 from relitigating

those issues which had been adjudicated by the California courts, as there was no proper basis for the Supreme Court to except from § 1738's reach all claims brought under the takings clause; and (2) while the Williamson County ripeness rule as to first seeking compensation in state court might have been incorrect, (a) neither side had asked the Supreme Court to reconsider this rule, and (b) resolving this ripeness-rule issue could not benefit the hotel owners.

### **COUNSEL**

Paul Utrecht argued the cause for petitioners.

Seth P. Waxman argued the cause for respondents.

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MICHAEL DONALD DODD, Petitioner

v

UNITED STATES

545 U.S. —, 162 L. Ed. 2d 343, 125 S. Ct. 2478

[No. 04-5286]

Argued March 22, 2005.

Decided June 20, 2005.

**Decision:** One-year limitation period for federal prisoner's motion for relief from sentence under 28 U.S.C.S. § 2255 on basis of newly recognized right held to begin when right recognized, rather than when right made retroactive.

## SUMMARY

The 1-year limitation period within which a federal prisoner may file, under 28 U.S.C.S. § 2255, a motion for relief from a sentence on the basis of a right newly recognized by the United States Supreme Court starts, according to § 2255's text, on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

A federal prisoner, who had been convicted for knowingly and intentionally engaging in a continuing criminal enterprise in violation of federal law, filed on April 4, 2001, a motion under § 2255 seeking to set aside that conviction on the basis of the United States Supreme Court's June 1, 1999, decision in *Richardson v. United States* (1999) 526 U.S. 813, 143 L. Ed. 2d 985, 119 S. Ct. 1707, holding that a jury was required to

agree unanimously that a defendant was guilty of each of the specific violations that together constituted a continuing criminal enterprise in order to convict the defendant of engaging in that criminal enterprise.

The United States District Court for the Southern District of Florida dismissed the prisoner's motion as time-barred because Richardson had been decided more than a year before the prisoner filed his motion.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the prisoner argued that § 2255's limitation period had not started for his motion until April 19, 2002, when the Court of Appeals had held in another case that the right recognized in Richardson applied retroactively to cases on collateral review. However, the Court of Appeals (1) held that the prisoner's limitation period had started when the Supreme Court decided Richardson; and (2) accordingly, affirmed the dismissal of the prisoner's motion as time-barred (365 F.3d 1273).

On certiorari, the Supreme Court affirmed. In an opinion by O'CONNOR, J., joined by REHNQUIST, Ch. J., and SCALIA, KENNEDY, and THOMAS, JJ., it was held that § 2255's 1-year limitation period started when the Supreme Court initially recognized a newly created right, rather than when the court made the right retroactive—and thus the prisoner's § 2255 motion in question was untimely—as (1) the text of § 2255 unequivocally identified the date on which the right asserted was initially recognized by the Supreme Court as the only date from which the limitation period was to run; and (2) as to the asserted time-bar problem resulting from the Supreme Court's purported practice of rarely deciding that a new right was retroactively applicable within 1 year of initially recognizing that right, (a) the court was not free to rewrite the statute

that Congress had enacted, and (b) the disposition required by § 2255's text, though strict, was not absurd.

STEVENS, J., joined in pertinent part by SOUTER, GINSBURG, and BREYER, JJ., dissenting, expressed the view that § 2255's 1-year limitation period ought to be construed to begin only when a right had been both recognized and made retroactive, as in enacting § 2255, Congress apparently had mistakenly assumed that the Supreme Court's recognition of a new right and the court's decision to apply the right retroactively would be made at the same time, for it seemed nonsensical to assume that Congress deliberately had enacted a statute that recognized a cause of action but wrote the limitation period in a way that might—because of the passage of time between a right's recognition and its being made retroactive—preclude an individual from ever taking advantage of the cause of action.

GINSBURG, J., joined by BREYER, J., dissenting, expressed the view that § 2255's limitation period was most sensibly read to start when a newly recognized right was made retroactively applicable to cases on collateral review, as the Supreme Court's holding that the period began when the court initially recognized the right presented a real risk that the period would expire before a § 2255 petitioner's cause of action accrued.

## COUNSEL

Janice L. Bergmann argued the cause for petitioner.  
James A. Feldman argued the cause for respondent.

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RONALD ROMPILLA, Petitioner

v

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS

545 U.S. —, 162 L. Ed. 2d 360, 125 S. Ct. 2456

[No. 04-5462]

Argued January 18, 2005.  
Decided June 20, 2005.

**Decision:** Sixth Amendment held to require reasonable efforts by capital defendant's counsel to obtain and review material that counsel expects prosecution to rely on as aggravating evidence at sentencing, even when defendant and defendant's family members suggest that no mitigating evidence is available.

## SUMMARY

During the penalty phase of the trial of an accused who had been convicted in a Pennsylvania state court of murder and related offenses, the prosecution, seeking the death penalty, presented evidence of aggravating factors that (1) the murder had been committed during a felony, (2) the murder had been committed by torture, and (3) the accused had a significant history of felony convictions indicating the use or threat of violence. In mitigation evidence presented by the two lawyers who served as the accused's defense counsel at trial, five members of the accused's family argued in effect for residual doubt and beseeched the jury for mercy. However, the jury, assigning greater weight to the aggravating factors, sentenced the accused to 228

death. The Pennsylvania Supreme Court affirmed the convictions and the sentence (539 Pa. 499, 653 A.2d 626).

The accused, asserting ineffective assistance by his trial counsel in failing to present significant mitigating evidence, sought state postconviction relief. A state court denied relief, and the Pennsylvania Supreme Court affirmed this denial (554 Pa. 378, 721 A.2d 786).

The accused, again asserting ineffective assistance of trial counsel, then sought federal habeas corpus relief under 28 U.S.C.S. § 2254. The United States District Court for the Eastern District of Pennsylvania (1) found that the Pennsylvania Supreme Court had unreasonably applied *Strickland v. Washington* (1984) 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (requiring accused alleging ineffective assistance of counsel, in violation of the Federal Constitution's Sixth Amendment, to show both failure to provide reasonably effective assistance and reasonable probability of different result if assistance had been reasonably effective); (2) determined that trial counsel had not investigated obvious signs of the accused's troubled childhood, mental illness, and alcoholism, and (3) granted the requested relief (2000 U.S. Dist. LEXIS 9620).

A panel of the United States Court of Appeals for the Third Circuit (1) concluded that the investigation by the accused's trial lawyers had gone far enough to give the lawyers reason to think that further efforts would not have been a wise use of their limited resources; and (2) reversed the District Court's judgment (355 F.3d 233). The Court of Appeals denied rehearing en banc (359 F.3d 310).

On certiorari, the United States Supreme Court reversed. In an opinion by SOUTER, J., joined by STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., it was held that in failing to examine the trial court's prior conviction file

on the accused, the accused's trial counsel had fallen below the standard of reasonable competence required of defense counsel under the Federal Constitution's Sixth Amendment—that even when a capital defendant and the defendant's family members had suggested that no mitigating evidence was available, the defendant's counsel was required to make reasonable efforts to obtain and review evidence that counsel knew the prosecution would probably rely on as aggravating evidence at the sentencing phase of trial—as:

(1) Trial counsel had known that the state (a) intended to seek the death penalty by proving that the defendant had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law; and (b) would (i) attempt to establish this history by proving the defendant's prior conviction for rape and assault, and (ii) introduce a transcript of the rape victim's testimony given in that earlier trial.

(2) The prior conviction file was a public document available at the courthouse where the accused was to be tried.

(3) Even after obtaining the transcript of the victim's testimony on the eve of the sentencing hearing, trial counsel apparently had examined none of the other material in the file.

(4) Reasonable efforts by trial counsel would have included obtaining the file to (a) learn what the state knew about the crime; (b) discover any mitigating evidence, and (c) anticipate the details of the aggravating evidence.

(5) The American Bar Association Standards for Criminal Justice in circulation at the time of the accused's trial supported the view that trial counsel had failed to meet their investigative duty.

O'CONNOR, J., concurring, expressed the view that the Supreme Court's opinion in the case at hand (1)

did not impose on trial counsel a rigid requirement to review all documents in the “case file” of any prior conviction that the prosecution might rely on at trial; but (2) instead, applied the court’s longstanding case-by-case approach to determining whether an attorney’s performance was constitutionally deficient under Strickland.

KENNEDY, J., joined by REHNQUIST, Ch. J., and SCALIA and THOMAS, JJ., dissenting, expressed the view that (1) the majority opinion in the case at hand (a) erroneously imposed on trial counsel a rigid requirement to review all documents in the “case file” of any prior conviction that the prosecution might rely on at trial, and (b) if followed, often would result in less effective counsel by diverting limited defense resources from other important tasks in order to satisfy the majority’s new *per se* rule; and (2) the majority was able to conclude that the accused in the case at hand was entitled to relief under § 2254 only by ignoring the established principle that a defendant had the burden of demonstrating that the defendant had been prejudiced by any deficiency in the defense attorneys’ performance.

## COUNSEL

Billy H. Nolas argued the cause for petitioner.

Amy Zapp argued the cause for respondent.

Traci L. Lovitt argued the cause for the United States, as amicus curiae, by special leave of Court.

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GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, et al., Petitioners

v

UNITED STATES ex rel. KAREN T. WILSON

545 U.S. —, 162 L. Ed. 2d 390, 125 S. Ct. 2444

[No. 04-169]

Argued April 20, 2005.

Decided June 20, 2005.

**Decision:** Six-year limitations period in False Claims Act provision (31 U.S.C.S. § 3731(b)(1)) held not to govern civil actions, under 31 U.S.C.S. § 3730(h), for retaliation; instead, most closely analogous state limitations period held to apply.

**SUMMARY**

In the False Claims Act, as amended (FCA), 31 U.S.C.S. § 3729(a) prohibited any person from making false or fraudulent claims for payment to the United States. The FCA authorized civil actions under 31 U.S.C.S. § 3730(a) (by the United States Attorney General) and 31 U.S.C.S. § 3730(b) (by individuals in the name of the Federal Government). In addition, 31 U.S.C.S. § 3730(h) provided a private cause of action for an individual retaliated against by the individual's employer for assisting an FCA investigation or proceeding. Also, 31 U.S.C.S. § 3731(b)(1) provided that a "civil action under section 3730" could not be brought "more than 6 years after the date on which the violation of section 3729 [was] committed."

In 2001, an individual brought an FCA suit, in the United States District Court for the Western District of

North Carolina, against defendants including a county conservation district. The individual included allegations that (1) the defendants had made numerous false claims for payment; and (2) in 1996 and 1997, officials of the conservation district (a) had retaliated against the individual—who had then been an employee of the conservation district—for aiding federal officials in their investigation of these false claims, and (b) eventually induced the individual to resign in March 1997. However, the District Court granted a defense motion to dismiss the individual's retaliation action as untimely, where the District Court agreed with the defense arguments that (1) § 3731(b)(1)'s 6-year limitations period ought not to apply to the retaliation action; and (2) instead, North Carolina's 3-year limitations period for retaliatory-discharge actions ought to be borrowed. The District Court then denied the individual's request for reconsideration of this dismissal, but certified the limitations issue for interlocutory appeal (224 F. Supp. 2d 1042).

The United States Court of Appeals for the Fourth Circuit, in reversing and in ordering a remand, expressed the view that § 3731(b)(1) supplied a limitations period for § 3730(h) retaliation actions, making it unnecessary to borrow one from North Carolina law (367 F.3d 245).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by THOMAS, J., joined by REHNQUIST, Ch. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., and joined in pertinent part by SOUTER, J., it was held that the 6-year limitations period in § 3731(b)(1) did not govern § 3730(h) retaliation actions—and instead, the most closely analogous state limitations period applied to such an action (although it was not decided which period this would be for the individual's retaliation action in the case at hand)—as:

(1) When § 3731(b)(1) was read in its proper context, § 3731(b)(1) was ambiguous, rather than clear, about whether a § 3730(h) retaliation action was “a civil action under section 3730,” for another reasonable reading was that § 3731(b)(1) applied to only actions arising under § 3730(a) and § 3730(b), not to § 3730(h) retaliation actions.

(2) The better way to resolve this ambiguity was to read § 3731(b)(1)’s 6-year period to govern only § 3730(a) and § 3730(b) actions, for:

(a) It was conceded that 31 U.S.C.S. § 3731(c), concerning proof by the United States, used a similarly unqualified phrase “action brought under section 3730” to refer only to § 3730(a) and § 3730(b) actions.

(b) Reading § 3731(b)(1) to apply only to § 3730(a) and § 3730(b) actions was in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues.

(c) Reading § 3731(b)(1) to apply to § 3730(h) actions would be in tension with this rule, as such a reading would (i) start the time limit running before the retaliation action accrued, and (ii) allow a retaliation action to be time-barred even before the action ever accrued.

STEVENS, J., concurred in the judgment for the reasons stated in his dissenting opinion in *Dodd v. United States* (2005) 545 U.S. ——, 162 L. Ed. 2d 343, 125 S. Ct. —— (decided on the same day as the instant case).

BREYER, J., joined by GINSBURG, J., dissented, expressing the view that—while it was unusual to find a statute of limitations keyed not to the time of the plaintiff’s injury, but to other related events—(1) Congress had written such a statute in the situation at issue; and (2) the Supreme Court should have respected Congress’ decision, by instead holding that § 3731(b)(1)’s 6-year

limitations period applied to a § 3730(h) retaliation action, as a “civil action under section 3730.”

### COUNSEL

Christopher G. Browning, Jr. argued the cause for petitioners.

Mark Hurt argued the cause for respondent.

Douglas Hallward-Driemeier argued the cause for the United States, as amicus curiae, by special leave of court.

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AMERICAN TRUCKING ASSOCIATIONS, INC. and  
USF HOLLAND, INC., Petitioners

v

MICHIGAN PUBLIC SERVICE COMMISSION et al.

545 U.S. —, 162 L. Ed. 2d 407, 125 S. Ct. 2419

[No. 03-1230]

Argued April 26, 2005.

Decided June 20, 2005.

**Decision:** Michigan's flat \$100 annual fee imposed—for administration of state's motor carrier statute—upon trucks engaging in intrastate commercial hauling held not to violate Federal Constitution's dormant commerce clause (Art. I, § 8, cl. 3).

## SUMMARY

A provision of Michigan's motor carrier statute imposed an annual fee of \$100 for each truck that undertook point-to-point hauls between Michigan cities. The stated purpose of the fee was for the administration of the motor carrier statute.

A Michigan trucking company that engaged in both interstate and intrastate hauling, together with a trucking association, brought suit against the state and various state agencies in Michigan's Court of Claims. This suit sought invalidation of the fee, on the asserted grounds that (1) trucks carrying both interstate and intrastate loads engaged in intrastate business less than trucks that confined their operations to Michigan, and

(2) the flat fee thus discriminated against interstate carriers and imposed an unconstitutional burden upon interstate trade.

The Court of Claims, in granting summary disposition to the defendants, concluded that the fee (1) was regulatory and intended for the administration of Michigan's motor carrier statute; (2) was not amenable to apportionment; (3) was an appropriate exercise of the state's police power; and (4) did not implicate the Federal Constitution's commerce clause (Art. I, § 8, cl. 3), as the fee fell on intrastate commerce only.

The Court of Appeals of Michigan, in affirming, did not agree that the fee's intrastate nature sheltered the fee from commerce clause scrutiny, but nonetheless concluded that (1) the fee regulated evenhandedly; (2) the record lacked any evidence that any trucking firm's route choices were affected by the imposition of the fee; and (3) the claim of discrimination was purely speculative, as the record indicated that any effect on interstate commerce was incidental (255 Mich. App. 589, 662 N.W.2d 784). The Supreme Court of Michigan denied leave to appeal (469 Mich. 976, 673 N.W.2d 752).

On certiorari, the United States Supreme Court affirmed. In an opinion by BREYER, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., it was held that the fee did not violate the dormant commerce clause—a negative command creating an area of trade free from interference by the states—for:

(1) The fee (a) was imposed upon only activities taking place exclusively within the state's borders, (b) did not facially discriminate against interstate or out-of-state activities or enterprises, and (c) applied evenhandedly to all carriers that made domestic journeys.

(2) The record (a) showed no special circumstance

suggesting that the fee operated in practice as anything other than an unobjectionable exercise of the state's police power; and (b) contained little, if any, evidence that the fee imposed any significant practical burden upon interstate trade.

(3) A per-truck assessment was likely a fair method of defraying state administrative costs, and an effort to switch the manner of fee assessment—from lump sum to miles traveled, for example—would not have been burden-free.

(4) Although it had to be conceded that if every state did the same as Michigan, then an interstate trucker doing local business in multiple states would have had to pay fees totaling hundreds or thousands of dollars, the fee at issue did not fail an "internal consistency" test, as any interstate firm with local outlets would normally expect to pay local fees uniformly assessed on all those—interstate and domestic firms alike—engaging in local business.

SCALIA, J., concurring in the judgment, expressed the view that the fee did not violate the negative commerce clause, as the fee (1) did not facially discriminate against interstate commerce; and (2) was distinguishable from the fees invalidated in *American Trucking Ass'ns v. Scheiner* (1987) 483 U.S. 266, 97 L. Ed. 2d 226, 107 S. Ct. 2829, which fees had applied to interstate trucks even when such trucks engaged in no intrastate business.

THOMAS, J., concurring in the judgment, expressed the view that the negative commerce clause (1) had no basis in the text of the Constitution; (2) made little sense; (3) had proved virtually unworkable in application; and (4) consequently, could not serve as a basis for striking down a state statute.

**COUNSEL**

Robert Digges, Jr. argued the cause for petitioners in No. 03-1230 [this case].

James H. Hanson argued the cause for petitioners in No. 03-1234 [162 L. Ed. 2d 418].

Henry J. Boynton argued the cause for respondents.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

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MID-CON FREIGHT SYSTEMS, INC., et al., Petitioners

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al.

545 U.S. —, 162 L. Ed. 2d 418, 125 S. Ct. 2427

[No. 03-1234]

Argued April 26, 2005.

Decided June 20, 2005.

**Decision:** Michigan law, imposing annual fee of \$100 on each truck bearing Michigan license plate and operating entirely in interstate commerce, held not pre-empted by Intermodal Surface Transportation Efficiency Act provision (49 U.S.C.S. § 14504(b)).

## SUMMARY

A provision of Michigan law imposed an annual fee of \$100 upon each truck that bore a Michigan license plate and operated entirely in interstate commerce. Some interstate trucking companies with trucks that were subject to the \$100 fee brought suit in Michigan's Court of Claims against the state of Michigan and various state agencies. Among the companies' claims was that the Michigan law was invalid as pre-empted by a provision of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (49 U.S.C.S. § 14504(b)) under which a "State registration requirement" that imposed so high a fee was an unreasonable burden upon interstate commerce.

The Court of Claims granted summary disposition in the defendants' favor. The Court of Appeals of Michi-  
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gan, in affirming, concluded that the \$100 fee (1) was a "regulatory fee" imposed for (a) the administration of the Michigan's motor carrier act, and (b) enforcement of state safety regulations; and (2) thus fell outside the scope of the term "registration requirement" as used in § 14504(b) (255 Mich. App. 589, 662 N.W.2d 784). The Supreme Court of Michigan denied leave to appeal (469 Mich. 976, 673 N.W.2d 752).

On certiorari, the United States Supreme Court affirmed the Court of Appeals' judgment. In an opinion by BREYER, J., joined by STEVENS, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., it was held that Michigan's law was not pre-empted by § 14504(b), for:

(1) Reference to the text, historical context, and purpose of § 14504(b) disclosed that the words "State registration requirement" applied only to those state requirements that (a) concerned the subject matter of the "Single State Registration System" (SSRS) as provided in another ISTEA provision (49 U.S.C.S. § 14504(c))—that is, registration with a state of (i) evidence that a carrier possessed a federal permit, (ii) proof of insurance, and (iii) the name of an agent for service of process—and (b) were in excess of the requirements that the SSRS imposed in respect to that subject matter.

(2) The Michigan law did not concern the subject matter of the SSRS, as (a) the Michigan law made no reference to evidence of a federal permit, to any insurance requirement, or to an agent for receiving service of process; (b) the Michigan law did not represent an effort to circumvent the limitations imposed in connection with federal laws governing state registration of federal permits; (c) there was no demonstration that the Michigan law, in practice, held hostage a truck owner's SSRS compliance until the owner paid the state's \$100 fee; and (d) the fact that Michigan ap-

peared to forgive the state's \$10 SSRS fee for trucks that complied with the Michigan law could be seen merely as an effort to provide a modest and administratively efficient recompense to those motor carriers that chose Michigan as their base state for SSRS purposes.

KENNEDY, J., joined by REHNQUIST, Ch. J., and O'CONNOR, J., dissenting, expressed the view that (1) the Michigan Court of Appeals had erred in holding that the Michigan law was not a registration requirement; and (2) the United States Supreme Court had erred in holding that the term "State registration requirement" in § 14504(b) included only those state registration requirements that concerned the same subject matter as the SSRS.

#### COUNSEL

Robert Digges, Jr. argued the cause for petitioners in No. 03-1230 [162 L. Ed. 2d 407].

James H. Hanson argued the cause for petitioners in No. 03-1234 [this case].

Henry J. Boynton argued the cause for respondents.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

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SUSETTE KELO, et al., Petitioners

v

CITY OF NEW LONDON, CONNECTICUT, et al.

545 U.S. —, 162 L. Ed. 2d 439, 125 S. Ct. 2655

[No. 04-108]

Argued February 22, 2005.

Decided June 23, 2005.

**Decision:** Proposed disposition of property “to increase tax and other revenues, and to revitalize . . . economically distressed city” held to qualify as “public use” within meaning of takings clause of Federal Constitution’s Fifth Amendment.

## SUMMARY

After the state of Connecticut authorized two bond issues—one to support the planning activities of a private nonprofit development corporation that had been established to assist the city of New London in planning economic development, and the other to support creation of a state park in the city’s waterfront area—a pharmaceutical company announced that it would build a \$300 million research facility near the park.

Subsequently, the city approved a development plan that (1) according to the Connecticut Supreme Court, was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas”; and (2) involved land that (a) included the state park and approximately 115 privately owned properties, (b) was adjacent to the pharmaceu-

tical company's facility, and (c) had been designated for a hotel, restaurants, retail and office spaces, marinas for both recreational and commercial uses, a pedestrian riverwalk, approximately 80 new residences, a museum, and parking spaces.

When the city, through the development agency, sought to use the power of eminent domain to acquire some of the property in the development area, nine owners of 15 of the privately owned properties in the area—none of which properties were alleged to be blighted or otherwise in poor condition—brought, in the New London Superior Court, an action including claims that the taking of the owners' properties would violate the provision, in the Federal Constitution's Fifth Amendment, that a government could take private property for only "public use." The Superior Court (1) granted a permanent restraining order prohibiting the taking of the some of the properties; but (2) denied relief as to others.

On appeal, the Connecticut Supreme Court, in affirming in part and reversing in part, held that (1) the "economic development" in question qualified as a valid public use under federal and state law; and (2) all of the city's proposed takings were valid (268 Conn. 1, 843 A.2d 500).

On certiorari, the United States Supreme Court affirmed. In an opinion by STEVENS, J., joined by KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., it was held that the city's proposed disposition of property under the development plan qualified as a "public use" under the Fifth Amendment, so that the city properly could use the power of eminent domain to acquire the unwilling sellers' property, as:

(1) The city had carefully formulated a plan that it believed would provide appreciable benefits to the community, including—but by no means limited

to—new jobs and increased tax revenue.

(2) As with other exercises in urban planning and development, the city was endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that these uses would form a whole greater than the sum of its parts.

(3) To effectuate the plan, the city had invoked a state statute that specifically authorized the use of eminent domain to promote economic development.

(4) Given the comprehensive character of the plan, the thorough deliberation that had preceded the plan's adoption, and the limited scope of the Supreme Court's review, it was appropriate for the court to resolve the challenges of the individual private owners, not on a piecemeal basis, but rather in light of the entire plan.

KENNEDY, J., concurring, expressed the view that (1) a court applying rational-basis review under the Fifth Amendment's public use clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits; (2) where the purpose of a taking is economic development and that development is to be carried out by private parties or private parties will benefit, a court must decide if the stated public purpose is incidental to the benefits to private parties; and (3) a court confronted with a plausible accusation of impermissible favoritism to private parties should review the record to see if the objection has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose.

O'CONNOR, J., joined by REHNQUIST, Ch. J., and SCALIA and THOMAS, JJ., dissenting, expressed the view that (1) as a result of Supreme Court's opinion in the case at

hand, under the banner of economic development, all private property was vulnerable to being taken and transferred to another private owner, so long as the property might be “upgraded”—given to an owner who would use it in a way that the legislature deemed more beneficial to the public—in the process; and (2) the reasoning, expressed in the court’s opinion, that the incidental public benefits resulting from the subsequent ordinary use of private property rendered economic-development takings “for public use” (a) washed out any distinction between private and public use of property, and (b) thereby effectively deleted the words “for public use” from the Fifth Amendment.

THOMAS, J., dissenting, expressed the view that (1) if such economic-development takings as the one in question were for a public use, than (a) any taking was for public use, and (b) the Supreme Court had erased the public use clause from the Constitution; and (2) the case at hand was one of a string of the court’s cases that (a) had strayed from the public use clause’s original meaning, and (b) ought to be reconsidered.

### **COUNSEL**

Scott G. Bullock argued the cause for petitioners.  
Wesley W. Horton argued the cause for respondents.

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AURELIO O. GONZALEZ, Petitioner

v

JAMES V. CROSBY, Jr., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

545 U.S. —, 162 L. Ed. 2d 480, 125 S. Ct. 2641

[No. 04-6432]

Argued April 25, 2005.

Decided June 23, 2005.

**Decision:** Florida prisoner's motion, invoking Rule 60(b)(6) of Federal Rules of Civil Procedure, for relief from adverse limitations-based ruling, held not equivalent to successive federal habeas corpus petition, but relief held correctly denied under Rule 60(b).

## SUMMARY

Rule 60(b) of the Federal Rules of Civil Procedure provided several grounds for relief from a judgment, including, under Rule 60(b)(6), "any other reason" justifying relief. However, under Rule 11 of the [28 U.S.C.S.] § 2254 Rules, Rule 60(b)—like the rest of the Rules of Civil Procedure—applied in federal habeas corpus proceedings involving state prisoners only to the extent that Rule 60(b) was not inconsistent with applicable federal statutory provisions and rules. Moreover, 28 U.S.C.S. § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposed restrictions on claims presented by state prisoners in second or successive habeas corpus petitions.

A Florida prisoner, who had pleaded guilty to a state robbery charge and who had received a 99-year sen-

tence, (1) filed a federal habeas corpus petition in the United States District Court for the Southern District of Florida, and (2) alleged that his guilty plea had not been entered knowingly and voluntarily. However, the District Court adopted a Magistrate Judge's recommendation and, in a ruling, dismissed this petition as assertedly barred by the limitations period in another AEDPA provision (28 U.S.C.S. § 2244(d)).

A judge of the United States Court of Appeals for the Eleventh Circuit denied the prisoner a certificate of appealability (COA) on April 6, 2000, and the prisoner did not file for rehearing or review of that decision.

On April 17, 2000, the United States Supreme Court granted review in another limitations case under § 2244(d). This case eventually resulted in the Supreme Court's November 7 decision in *Artuz v. Bennett* (2000) 531 U.S. 4, 148 L. Ed. 2d 213, 121 S. Ct. 361, concerning tolling of the limitations period.

Almost 9 months later, the prisoner in the case at hand filed a motion which (1) was found to invoke Rule 60(b)(6); and (2) sought relief on the basis that the *Artuz* decision allegedly showed the error in the District Court's prior limitations ruling. However, the District Court denied the motion.

On appeal, in eventually rehearing the case in banc, the Court of Appeals in pertinent part granted the prisoner a COA, but affirmed the District Court's denial of the prisoner's motion, as the Court of Appeals expressed the view that this motion (1) was in substance a second or successive federal habeas corpus petition; and (2) as such, did not meet the restrictive requirements of § 2244(b) (366 F.3d 1253).

On certiorari, the United States Supreme Court affirmed. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., it was held that:

(1) In a federal habeas corpus case under § 2254, a state prisoner's motion, invoking Rule 60(b) for relief from a judgment, is not to be treated as a second or successive federal habeas corpus petition—which would be subject to the restrictions on such petitions in § 2244(b)—if the motion does not assert, or reassert, claims of error in the movant's state conviction.

(2) Thus, the state prisoner's Rule 60(b)(6) motion in the case at hand was not the equivalent of a successive federal habeas corpus petition—and so was not subject to § 2244(b)'s restrictions—for the prisoner had not made a federal habeas corpus "claim," within the meaning of § 2244(b), merely by asserting that the District Court's prior limitations ruling, which had precluded a merits determination, was in error.

(3) However, under the Rule 60(b) standards that properly governed the prisoner's motion, the District Court had been correct to deny the prisoner relief on this motion, because the motion had failed to set forth an extraordinary circumstance justifying relief, as (a) even assuming that the District Court's prior limitations ruling was incorrect, it was hardly extraordinary that subsequently, the Supreme Court had arrived at a different interpretation of § 2244(d); and (b) the change in the law worked by the Artuz decision was all the less extraordinary in the prisoner's case, because of his lack of diligence in pursuing review of the limitations issue.

BREYER, J., concurring, expressed the view that, as the Supreme Court had explained, a proper Rule 60(b) motion attacks, not the substance of a federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas corpus proceedings.

STEVENS, J., joined by SOUTER, J., dissenting, expressed the view that while the Supreme Court had correctly

recognized that the answer to the question whether a Rule 60(b) motion could proceed in the federal habeas corpus context depended on the nature of the relief which the motion sought—and while the Supreme Court had correctly held that in the case at hand, the prisoner's motion was a “true” Rule 60(b) motion—(1) the Supreme Court had improperly (a) reached beyond the question on which certiorari had been granted, and (b) adjudicated the merits of the prisoner's Rule 60(b) motion, instead of allowing the District Court to address the motion's merits in the first instance; and (2) the Supreme Court's truncated analysis of the motion's merits was unsatisfactory.

### **COUNSEL**

Paul M. Rashkind argued the cause for petitioner.

Christopher M. Kise argued the cause for respondent.

Patricia A. Millett argued the cause for the United States, as amicus curiae, by special leave of court.

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EXXON MOBIL CORPORATION, Petitioner

v

ALLAPATTAH SERVICES, INC., et al. (04-70)

MARIA del ROSARIO ORTEGA, et al., Petitioners

v

STAR-KIST FOODS, INC. (04-79)

545 U.S. —, 162 L. Ed. 2d 502, 125 S. Ct. 2611

Argued March 1, 2005.

Decided June 23, 2005.

**Decision:** In diversity action under 28 U.S.C.S. § 1332, where other elements of jurisdiction were present—and where at least one named plaintiff satisfied jurisdictional amount—28 U.S.C.S. § 1367 held to authorize federal court to exercise supplemental jurisdiction over claims of other plaintiffs in same case or controversy.

## SUMMARY

Under 28 U.S.C.S. § 1367, which was enacted in 1990, (1) the first of two sentences in 28 U.S.C.S. § 1367(a) provided that with certain exceptions (including the exceptions in 28 U.S.C.S. § 1367(b)), in any civil action of which the Federal District Courts had original jurisdiction, the District Courts would have supplemental jurisdiction over all other claims that were so related to claims in the action within such original jurisdiction that they formed part of the same case or controversy under Article III of the Federal Constitution; (2) the last sentence of § 1367(a) provided that such supplemental jurisdiction would in-

clude claims that involved the joinder or intervention of additional parties; and (3) § 1367(b) provided that in any civil action of which the District Courts had original jurisdiction founded solely on 28 U.S.C.S. § 1332 (concerning diversity of citizenship), the District Courts would not have supplemental jurisdiction over claims by parties or persons under some specific rules of the Federal Rules of Civil Procedure.

Two cases involved the effect of § 1367 on § 1332's requirement of a minimum amount in controversy, which was sometimes called the jurisdictional amount. Prior to § 1367's enactment, the United States Supreme Court had generally held that the jurisdictional amount had to be satisfied for each plaintiff in a federal-court civil action.

In the first case in question, dealers of a fuel company (1) filed a purported class action against the company in the United States District Court for the Northern District of Florida; (2) alleged that they had been systematically overcharged for fuel purchased from the company; and (3) invoked the District Court's diversity jurisdiction. After a jury verdict in favor of the plaintiffs, the District Court certified the case for interlocutory review and asked whether the court had properly exercised § 1367 supplemental jurisdiction over the claims of class members who did not meet the jurisdictional amount. The United States Court of Appeals for the Eleventh Circuit, in affirming, upheld the District Court's extension of supplemental jurisdiction to these class members (333 F. 3d 1248).

In the second case, a child (1) sued a food company in a diversity action in the United States District Court for the District of Puerto Rico, and (2) sought damages for what were alleged to be unusually severe injuries received from slicing her finger on a tuna can. Members of the child's family joined in the suit, seeking

damages for emotional distress and certain medical expenses. However, the District Court, finding that none of the plaintiffs met the minimum amount-in-controversy requirement, granted summary judgment to the food company. On appeal, the United States Court of Appeals for the First Circuit—in affirming in part, vacating in part, and ordering a remand—(1) ruled that the child, but not her family members, had made allegations of damages in the requisite amount; and (2) held that in light of this ruling, supplemental jurisdiction over the family members' claims was not proper under § 1337 (370 F. 3d 124).

On certiorari, the Supreme Court—having consolidated the two cases—(1) affirmed the judgment of the Court of Appeals for the Eleventh Circuit; (2) reversed the judgment of the Court of Appeals for the First Circuit; and (3) remanded the latter case for further proceedings. In an opinion by KENNEDY, J., joined by REHNQUIST, Ch. J., and SCALIA, SOUTER, and THOMAS, JJ., it was held that:

(1) In a diversity action where the other elements of jurisdiction were present—and where at least one named plaintiff satisfied § 1332's amount-in-controversy requirement—§ 1337 authorized a District Court to exercise supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy (subject to certain enumerated exceptions not at issue in the two consolidated cases at hand), even if those other plaintiffs' claims were for less than the jurisdictional amount specified in § 1332.

(2) In such a situation, (a) § 1337 was not ambiguous, and (b) the contrary view of supplemental jurisdiction would be inconsistent with § 1337's text, when read in light of other statutory provisions and the Supreme Court's established jurisprudence.

STEVENS, J., joined by BREYER, J., dissenting, expressed the view that § 1367's legislative history provided powerful confirmation of the persuasive account, in the opinion of GINSBURG, J. (below), of § 1367's text and jurisprudential backdrop, so as to show that the Supreme Court's interpretation of § 1367 was mistaken.

GINSBURG, J., joined by STEVENS, O'CONNOR, and BREYER, JJ., dissenting, expressed the view that (1) while the Supreme Court adopted a plausibly broad reading of § 1367, there was a narrower construction that (a) was suggested by § 1367's text, (b) would be the better reading of § 1367, and (c) would be less disruptive of the Supreme Court's jurisprudence regarding supplemental jurisdiction; and (2) under this narrower and better reading, (a) a District Court would first be required to have "original jurisdiction" over a "civil action" before supplemental jurisdiction could attach, and (b) supplemental jurisdiction would not open the way for the joinder of plaintiffs—or the inclusion of class members—who did not independently meet the amount-in-controversy requirement of § 1332.

## COUNSEL

Carter G. Phillips argued the cause for petitioner in No. 04-70.

Eugene E. Stearns argued the cause for respondents in No. 04-70.

Donald B. Ayer argued the cause for petitioners in No. 04-79.

Robert A. Long, Jr. argued the cause for respondent in No. 04-79.

FRANCIS A. ORFF, et al., Petitioners

v

UNITED STATES et al.

545 U.S. —, 162 L. Ed. 2d 544, 125 S. Ct. 2606

[No. 03-1566]

Argued February 23, 2005.

Decided June 23, 2005.

**Decision:** Provision of Reclamation Reform Act (43 U.S.C.S. § 390uu) held not to waive United States' immunity from suit by parties claiming that federal agency's reduction of water supply to local water district had breached federal reclamation contract.

## SUMMARY

In 1963, the United States agreed to a 40-year water-service contract with a water district in California. The contract provided, among other things, that the United States would furnish to the district specified annual quantities of water. However, in order to avert possible harm to some threatened species and other wildlife, the United States Bureau of Reclamation reduced the water delivery by 50 percent in the 1993-1994 water year.

The water district and other parties brought suit in the United States District Court for the Eastern District of California against the United States and various federal entities and officials. Although the water district and some of the parties stipulated to a dismissal, some intervening plaintiffs—individual farmers and farming entities—pressed forward with various claims, among

them that the United States had breached the 1963 contract by reducing the delivery of water.

The District Court initially decided that the intervenors (1) were intended third-party beneficiaries of the contract, and (2) could maintain their suit pursuant to a provision of the Reclamation Reform Act (43 U.S.C.S. § 390uu), which granted consent to join the United States as a necessary party defendant in any suit to adjudicate certain rights under a federal reclamation contract. However, the District Court ultimately concluded that the intervenors (1) were neither contracting parties nor intended third-party beneficiaries of the 1963 contract, and (2) therefore could not benefit from § 390uu's waiver of sovereign immunity. The United States Court of Appeals for the Ninth Circuit affirmed in relevant part (358 F.3d 1137).

On certiorari, the United States Supreme Court affirmed. In an opinion by THOMAS, J., expressing the unanimous view of the court, it was held that the United States' immunity from suits directly against the United States was not waived under § 390uu, for the language of § 390uu (1) did not permit a plaintiff to sue the United States alone, as in the case at hand; but (2) rather, was best interpreted to grant consent to join the United States in an action between other parties—for example, two water districts, or a water district and its members—when (a) the action required construction of a reclamation contract, and (b) joinder of the United States was necessary.

## COUNSEL

William M. Smiland argued the cause for petitioners.

Jeffrey P. Minear argued the cause for respondent United States.

Stuart L. Somach argued the cause for respondent Westlands Water District.

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ANTONIO DWAYNE HALBERT, Petitioner

v

MICHIGAN

545 U.S. —, 162 L. Ed. 2d 552, 125 S. Ct. 2582

[No. 03-10198]

Argued April 25, 2005.

Decided June 23, 2005.

**Decision:** Due process and equal protection clauses of Federal Constitution's Fourteenth Amendment held to require appointed counsel for indigent defendants, convicted on pleas, seeking access to Michigan Court of Appeals' first-tier review.

## SUMMARY

In *Douglas v. California* (1963) 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814, reh den 373 U.S. 905, 10 L. Ed. 2d 200, 83 S. Ct. 1288, the United States Supreme Court held that a state was required to appoint counsel for an indigent criminal defendant in a first appeal as of right, as the court noted that (1) an appeal of right yielded an adjudication on the merits; and (2) prior to first-tier review, the defendant's claims had not been presented by a lawyer and passed upon by an appellate court. However, in *Ross v. Moffitt* (1974) 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437, it was held that a state was not required to appoint counsel for an indigent defendant seeking to pursue a second-tier discretionary appeal to a state's highest court—or, thereafter, certiorari review in the United States Supreme Court—as (1) at that stage, the reviewing court's function, rather than being primarily error correction, involved matters in-

cluding whether (a) the issues presented were of significant public interest, (b) the cause involved legal principles of major significance to the state's jurisprudence, and (c) the decision below was in probable conflict with precedent of the state's highest court; and (2) a defendant aided by counsel in a first-tier appeal as of right would possess (a) a transcript or other record of trial proceedings, (b) a brief in an appellate court setting forth the defendant's claims, and (c) often, the appellate court's opinion disposing of the case.

Under Michigan's two-tier appellate system, the Michigan Supreme Court heard appeals by leave only, while the intermediate Michigan Court of Appeals adjudicated appeals as of right from criminal convictions, except that a defendant convicted on a plea of guilty or nolo contendere who sought review in the Michigan Court of Appeals was required to apply for leave to appeal.

During the plea colloquy of an accused who, in a Michigan trial court, pleaded nolo contendere to two counts of criminal sexual conduct, the trial court (1) advised the accused of instances in which, although an appeal would not be of right, the trial court "must" or "may" appoint appellate counsel; but (2) did not tell the accused that the trial court could not appoint counsel in any other circumstances, including the accused's case. After the accused's sentence was imposed, he moved to withdraw his plea. However, the trial court denied the motion.

Subsequently, the accused—asserting that (1) his sentence had been misscored, (2) he needed counsel to preserve the issue before undertaking an appeal, and (3) he had learning disabilities and was mentally impaired—twice asked the trial court to appoint coun-

sel to help him prepare an application for leave to appeal to the Michigan Court of Appeals. The court denied both requests.

The accused then filed a pro se application for leave to appeal. The Michigan Court of Appeals denied the motion, and the Michigan Supreme Court declined review (469 Mich. 901, 669 N.W.2d 814).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by GINSBURG, J., joined by STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., it was held that the due process and equal protection clauses of the Federal Constitution's Fourteenth Amendment required appointment of counsel to assist indigent defendants, convicted on pleas of guilty or nolo contendere, in applying for leave to appeal to the Michigan Court of Appeals. The case at hand was controlled by Douglas rather than Ross, as:

(1) In determining how to dispose of an application for leave to appeal, the Court of Appeals (a) necessarily performed some evaluation of the merits of the applicant's claims; and (b) provided the first, and likely the only, direct review that the defendant's conviction and sentence would receive.

(2) Indigent defendants pursuing first-tier review in the Court of Appeals generally were ill equipped to represent themselves, for (a) a first-tier review applicant, forced to act pro se, would face a record unreviewed by appellate counsel; and (b) without guides keyed to a court of review, a pro se applicant's entitlement to seek leave to appeal to might be more formal than real.

THOMAS, J., joined by SCALIA, J., and joined in pertinent part by REHNQUIST, Ch. J., dissenting, expressed the view that, in finding Michigan law unconstitutional as applied to deny appointment of counsel to assist the accused in applying for leave to appeal to the state Court of Appeals, the Supreme Court had failed to

ground its analysis in any particular provision of the Constitution or in the Supreme Court's precedents.

### **COUNSEL**

David A. Moran argued the cause for petitioner.

Bernard E. Restuccia argued the cause for respondent.

Gene C. Schaerr argued the cause for Louisiana, et al., as amici curiae, by special leave of court.

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DENEICE A. MAYLE, WARDEN, Petitioner

v

JACOBY LEE FELIX

545 U.S. —, 162 L. Ed. 2d 582, 125 S. Ct. 2562

[No. 04-563]

Argued April 19, 2005.

Decided June 23, 2005.

**Decision:** Amended federal habeas corpus petition held not to relate back under Civil Procedure Rule 15(c)(2) to timely original petition (and thereby escape 28 U.S.C.S. § 2244(d)(1)(A)'s general 1-year time limit) when amended petition asserted new ground supported by facts different from those in original petition.

## SUMMARY

For an application for a federal writ of habeas corpus by a state prisoner, an Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provision (28 U.S.C.S. § 2244(d)(1)(A)) generally applied a 1-year limitation period, running from the date when the prisoner's state conviction became final. Rule 15(c)(2) of the Federal Rules of Civil Procedure provided that an amendment of a pleading related back to the date of the original pleading—the complaint in an ordinary civil case or the petition in a habeas corpus proceeding—when the original pleading and the amendment arose from the same “conduct, transaction, or occurrence.”

A California prisoner, whose state-court conviction of murder and robbery had become final on August 12, 262

1997, filed, on May 8, 1998, a pro se federal habeas corpus petition in which the prisoner asserted that the admission at the prisoner's trial of a videotape of statements made at a jailhouse interview by a witness for the prosecution had violated the prisoner's rights under the confrontation clause of the Federal Constitution's Sixth Amendment.

On May 29, 1998, a federal magistrate judge appointed counsel to represent the prisoner, and on January 28, 1999, the prisoner filed an amended habeas corpus petition asserting that the admission at trial of some statements made by the prisoner during pretrial interrogation by police had violated the prisoner's right against self-incrimination under the Constitution's Fifth Amendment. Moreover, the prisoner asserted that his original pleading and his amendment arose from the same conduct, transaction, or occurrence because the Fifth and Sixth Amendment claims challenged the constitutionality of the same criminal conviction.

In adopting the magistrate judge's report and recommendation in full, the United States District Court for the Eastern District of California (1) dismissed the prisoner's Fifth Amendment claim as time-barred, and (2) rejected his Sixth Amendment claim on its merits.

The United States Court of Appeals for the Ninth Circuit affirmed as to the Sixth Amendment claim, but reversed the dismissal of the Fifth Amendment claim and remanded it for further proceedings, as the Court of Appeals concluded that the relevant "transaction" for Rule 15(c)(2) relation-back purposes was the prisoner's state-court trial and conviction (379 F.3d 612).

On certiorari with respect to the relation-back part of the Court of Appeals' judgment, the United States Supreme Court reversed and remanded. In an opinion by GINSBURG, J., joined by REHNQUIST, Ch.J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., it

was held that the prisoner's amended petition was time-barred, as:

- (1) The Court of Appeals' definition of "conduct, transaction, or occurrence" to allow relation back of a claim first asserted in an amended petition, so long as the new claim stemmed from the petitioner's trial, conviction, or sentence was too broad, for (a) under this definition, virtually any new claim introduced in an amended petition would relate back; (b) the Supreme Court was not aware, in the run-of-the-mine civil proceedings that Rule 15 governed, of any reading of "conduct, transaction, or occurrence" that was so capacious; and (c) given AEDPA's finality and federalism concerns, it would have been anomalous to allow relation back under Rule 15(c)(2) on the basis of a broader reading of the words "conduct, transaction, or occurrence" in habeas corpus proceedings than in ordinary civil litigation.
- (2) Relation back depended on the existence of a common core of operative facts uniting the original and newly asserted claims.
- (3) The essential predicate for the prisoner's self-incrimination claim was an extrajudicial event.

SOUTER, J., joined by STEVENS, J., dissenting, expressed the view that (1) neither text nor precedent provided clear guidance for deciding how the relation-back provision of Rule 15(c)(2) ought to apply in habeas corpus cases; (2) nothing in habeas corpus law or practice called for the narrow construction that the Supreme Court gave the rule in the instant case; and (3) there were good reasons to go the other way, including the unfortunate consequence that the court's view created an unfair disparity between indigent habeas corpus petitioners and those able to afford their own counsel.

**COUNSEL**

Matthew K. M. Chan argued the cause for petitioner.

Lisa S. Blatt argued the cause for the United States, as amicus curiae, by special leave of court.

David M. Porter argued the cause for respondent.

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THOMAS VAN ORDEN, Petitioner

v

RICK PERRY, in his official capacity as GOVERNOR OF TEXAS and CHAIRMAN, STATE PRESERVATION BOARD, et al.

545 U.S. —, 162 L. Ed. 2d 607, 125 S. Ct. 2854

[No. 03-1500]

Argued March 2, 2005.

Decided June 27, 2005.

**Decision:** First Amendment's establishment of religion clause held to allow display, on Texas state capitol's grounds, of monument inscribed with Ten Commandments.

## SUMMARY

In 1961, a private civic organization presented the state of Texas with a granite monument, 6 feet high and 3 1/2 feet wide, whose primary content was the text of the Ten Commandments. Among the monument's other features were (1) carvings of an eagle grasping the American flag, an eye inside a pyramid, and two small tablets with what appeared to be an ancient script; (2) two Stars of David; (3) the superimposed Greek letters Chi and Rho, which represented Christ; and (4) an inscription acknowledging the organization's donation of the monument. The organization's stated goal in donating the monument was to highlight the Ten Commandments' role in shaping civic morality, as part of the organization's efforts to combat juvenile delinquency. The organization had consulted with a commit-

tee composed of members of several faiths in order to find an assertedly nonsectarian English-language text of the commandments.

The monument was placed on the Texas state capitol's grounds, a 22-acre area containing 17 monuments and 21 historical markers that were described by a Texas state legislative resolution as commemorating the "people, ideals, and events that compose Texan identity." Among such displays were monuments to "Heroes of the Alamo" and veterans of various wars.

In 2001, a suit against various Texas state officials was brought in the United States District Court for the Western District of Texas, under 42 U.S.C.S. § 1983, by an individual who (1) testified that he had encountered the Ten Commandments monument during frequent visits to the capitol grounds, (2) alleged that the monument's placement violated the establishment of religion clause of the Federal Constitution's First Amendment, and (3) sought declaratory relief and an injunction requiring the monument's removal.

The District Court, in denying declaratory and injunctive relief, concluded that the monument did not contravene the establishment of religion clause, for (1) the state had a valid secular purpose in recognizing and commending the donating organization's efforts to reduce juvenile delinquency, and (2) a reasonable observer would not conclude that the monument conveyed a message that the state was seeking to endorse religion (2002 U.S. Dist. LEXIS 26709). The United States Court of Appeals for the Fifth Circuit affirmed (351 F. 3d 173).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, five members of the court agreed that the establishment of religion clause allowed the display of the monument.

REHNQUIST, Ch. J., announced the judgment of the court and, in an opinion joined by SCALIA, KENNEDY, and THOMAS, JJ., expressed the view that (1) the establishment of religion clause did not bar any and all governmental preference for religion over irreligion; (2) the test of *Lemon v. Kurtzman* (1971) 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105, for establishment of religion was not useful in dealing with the sort of monument in question; (3) although the Ten Commandments had religious significance, they also had an undeniable historical meaning; and (4) the placement of the Ten Commandments monument on the capitol grounds was a far more passive use of those texts than the posting of the Ten Commandments in public school-rooms, a practice that the Supreme Court had found—in *Stone v. Graham* (1980) 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192—to have an improper and plainly religious purpose.

SCALIA, J., concurring, expressed the view that there was nothing unconstitutional in a state's (1) favoring religion generally, (2) honoring God through public prayer and acknowledgment, or (3) venerating the Ten Commandments in a nonproselytizing manner.

THOMAS, J., concurring, expressed the view that (1) the plurality opinion properly recognized (a) the role of religion in the nation's history, and (b) the permissibility of government displays acknowledging that history; and (2) on the basis of the original meaning of the establishment of religion clause, the Ten Commandments display at issue was constitutional, because the mere presence of the monument involved no religious coercion.

BREYER, J., concurring in the judgment, expressed the view that (1) the circumstances surrounding the display's placement on the capitol grounds and its physical

setting suggested that the state had intended the non-religious aspects of the Ten Commandments' message to predominate; (2) the monument's 40-year history on the capitol grounds indicated that this had been the monument's effect; (3) although the display might have satisfied the Supreme Court's more formal establishment of religion tests, consideration of the basic purposes of the First Amendment's religion clauses could be relied upon in reaching the conclusion that the display was constitutional; and (4) to reach a contrary conclusion (a) would have led the law to exhibit a hostility toward religion that had no place in establishment of religion clause traditions, and (b) could have created the kind of religiously based divisiveness that the establishment of religion clause sought to avoid.

STEVENS, J., joined by GINSBURG, J., dissenting, expressed the view that (1) under the establishment of religion clause, government had to remain neutral between religion and irreligion; (2) although the state might have genuinely wished to combat juvenile delinquency and to honor the donating organization, the state could not effectuate these purposes through an explicitly religious medium; (3) given that there were many distinctive versions of the Ten Commandments, the chosen text inscribed on the Texas monument placed the state at the center of a serious sectarian dispute; (4) even if the monument's message fairly could have been said to represent the belief system of all Judeo-Christians, the message would still have run afoul of the establishment of religion clause by prescribing a compelled code of conduct from a God that was rejected by some religions; and (5) the monument's setting on the capitol grounds enhanced the religious content of the monument's message.

O'CONNOR, J., dissented for essentially the reasons given in (1) the dissenting opinion of SOUTER, J., in the case at hand; and (2) the concurring opinion of O'CONNOR, J., in *McCreary County v. ACLU* (2005) 545 U. S. —, 162 L. Ed. 2d. 729, 125 S. Ct. — (decided on the same day as the case at hand).

SOUTER, J., joined by STEVENS and GINSBURG, JJ., dissenting, expressed the view that (1) although a display of the Ten Commandments accompanied by an exposition of how they have influenced modern law would most likely be constitutionally unobjectionable, the Texas monument's presentation of the Ten Commandments stood in contrast to any number of constitutional depictions of them, as in, for example, a frieze in the Supreme Court's own courtroom, where the figure of Moses stood among history's great lawgivers; (2) the argument that the monument's setting among the other monuments on the capitol grounds manifested a secular purpose was not persuasive; (3) the holding of *Stone v. Graham*, *supra*, ought not to be limited to Ten Commandments displays in a classroom setting; and (4) there was no persuasive argument for constitutionality in the observation that the lawsuit in the case at hand had come 40 years after the monument's erection.

## COUNSEL

Erwin Chemerinsky argued the cause for petitioner.  
Greg Abbott argued the cause for respondent.

Paul D. Clement argued the cause for the United States, as amicus curiae, by special leave of court.

TOWN OF CASTLE ROCK, COLORADO, Petitioner

v

JESSICA GONZALES, individually and as next friend of her deceased minor children, REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES

545 U.S. —, 162 L. Ed. 2d 658, 125 S. Ct. 2796

[No. 04-278]

Argued March 21, 2005.

Decided June 27, 2005.

**Decision:** Individual who had obtained Colorado-law restraining order held not to have property interest, protected under due process clause of Federal Constitution's Fourteenth Amendment, in having police enforce order.

## SUMMARY

Several weeks after a state trial court in Colorado had issued a wife a restraining order requiring her estranged husband to at all times remain at least 100 yards from the home in which the wife and the couple's three daughters resided, the husband allegedly (1) without notifying the wife, took the daughters while they were playing outside the home; and (2) killed the daughters.

The wife filed, under 42 U.S.C.S. § 1983, a suit alleging that the local town had violated the due process clause of the Federal Constitution's Fourteenth Amendment when the town's police officers, acting pursuant to official policy or custom, had failed to respond to the wife's repeated reports over several

hours that her husband had taken the three children in violation of her restraining order. The United States District Court for the District of Colorado, concluding that the wife had failed to state a claim on which relief could be granted, granted the town's motion to dismiss.

A panel of the United States Court of Appeals for the Tenth Circuit (1) found that the wife had alleged a cognizable procedural due process claim; and (2) reversed the dismissal of her complaint (307 F.3d 1258). On rehearing en banc, the Court of Appeals, reaching the same disposition as had the panel, ruled that wife had possessed a protected property interest in enforcement of her restraining order (366 F.3d 1093).

On certiorari, the United States Supreme Court reversed. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., it was held that the wife did not, for purposes of the due process clause, have a property interest in police enforcement of the restraining order—and, therefore, even under the facts as alleged by the wife, the police officers had not violated the wife's procedural due process rights by failing to respond to her requests that the police enforce the order—for (1) Colorado law did not make enforcement of restraining orders mandatory, as the state had not created a personal entitlement to such enforcement; (2) prior Supreme Court cases had recognized that a benefit was not a protected entitlement if government officials could grant or deny the benefit in their discretion; and (3) it was not clear that an individual entitlement to enforcement of a restraining order could constitute a "property" interest for purposes of the due process clause.

SOUTER, J., joined by BREYER, J., concurring, expressed the view that (1) the Fourteenth Amendment's due process clause extended procedural protection to

guard against unfair deprivation by state officials of substantive state-law property rights or entitlements; but (2) the wife claimed a property interest in a state-mandated process in and of itself, which argument was at odds with the rule that (a) due process was not an end in itself, and (b) its constitutional purpose was to protect a substantive interest to which an individual had a legitimate claim of entitlement.

STEVENS, J., joined by GINSBURG, J., dissenting, expressed the although neither the Constitution nor any federal statute granted the wife or her children any individual entitlement to police protection—and although, presumably, no Colorado statute created any such entitlement for the ordinary citizen—(1) federal law imposed no impediment to the creation of such an entitlement by Colorado law; (2) the wife could have entered into a contract with a private security firm, obligating the firm to provide protection to the wife's family; (3) the wife's interest in such a contract would have constituted "property" within the meaning of the due process clause; and (4) if a Colorado statute enacted for the wife's benefit, or a valid order entered by a Colorado judge, created the functional equivalent of such a private contract by granting the wife an entitlement to mandatory individual protection by the local police force, then that state-created right would also qualify as "property" entitled to constitutional protection.

**COUNSEL**

John C. Eastman argued the cause for petitioner.

John P. Elwood argued the cause for the United States, as amicus curiae, by special leave of court.

Brian J. Reichel argued the cause for respondents.

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RICKY BELL, WARDEN, Petitioner

v

GREGORY THOMPSON

545 U.S. —, 162 L. Ed. 2d 693, 125 S. Ct. 2825

[No. 04-514]

Argued April 26, 2005.

Decided June 27, 2005.

**Decision:** Federal Court of Appeals—in issuing amended habeas corpus opinion in favor of Tennessee prisoner who had been sentenced to death—held to have abused discretion by withholding mandate without formal order for months after Supreme Court had denied prisoner's certiorari petition and petition for rehearing.

## SUMMARY

Rule 41(b) of the Federal Rules of Appellate Procedure provided that a Federal Court of Appeals could “shorten or extend the time” to issue the court’s mandate. However, Rule 41(d)(2)(D) provided—with respect to a pending petition for certiorari review by the United States Supreme Court—that a Court of Appeals had to issue the mandate “immediately” when a copy of a Supreme Court order denying the certiorari petition was filed.

In a Tennessee trial, an accused was convicted of first-degree murder and was sentenced to death. After the accused was unsuccessful on direct review and in state postconviction proceedings, the accused (1) filed a federal habeas corpus petition in the United States District Court for the Eastern District of Tennessee; and

(2) included a claim of constitutionally ineffective assistance of counsel with respect to his death sentence. However, the District Court dismissed the prisoner's petition. Also, a deposition and report by a psychologist, who had been retained by the prisoner's federal habeas corpus attorneys, apparently was not included in the District Court's record. While the accused's appeal to the United States Court of Appeals for the Sixth Circuit was pending, he filed a motion requesting the District Court to supplement the record with the psychologist's report and deposition, but the District Court denied the motion as assertedly untimely.

On appeal, the Court of Appeals initially affirmed the District Court's denial of federal habeas corpus relief (315 F. 3d 566, 2003 FED App. 6P). The accused filed a rehearing petition which referred to the psychologist's evidence. The Court of Appeals denied rehearing (2003 U.S. App. LEXIS 4284) and stayed the issuance of the mandate, pending disposition of the accused's petition for certiorari.

On December 1, 2003, the Supreme Court denied certiorari (540 U.S. 1051, 157 L. Ed. 2d 701, 124 S. Ct. 804). The Court of Appeals (1) granted a motion by the accused, and (2) ordered that the mandate be stayed to allow the accused time to file a petition for rehearing from the certiorari denial, and "thereafter until the Supreme Court dispose[d] of the case." On January 20, 2004, the Supreme Court denied the accused's petition for rehearing (540 U.S. 1158, 157 L. Ed. 2d 1058, 124 S. Ct. 1162). A copy of the order was filed with the Court of Appeals on January 23, 2004, but the Court of Appeals did not issue its mandate.

Instead, on June 23, 2004, the Court of Appeals (1) issued an amended opinion in the accused's case; (2) vacated the District Court's judgment denying federal habeas corpus relief; (3) ordered a remand for an

evidentiary hearing on the accused's ineffective-assistance-of-counsel claim; (4) relied on what the Court of Appeals said was its equitable power to supplement the record on appeal with the psychologist's deposition, which, according to the Court of Appeals, (a) had been "apparently negligently omitted," and (b) was probative of the accused's mental state at the time of the crime; and (4) also relied on what the Court of Appeals said was its inherent power to reconsider its opinion prior to the issuance of the mandate (373 F. 3d 688, 2004 FED App. 195P).

On certiorari, the Supreme Court reversed. In an opinion by KENNEDY, J., joined by REHNQUIST, Ch. J., and O'CONNOR, SCALIA, and THOMAS, JJ., it was held that—even if it were assumed, for the purposes of argument, that in some instances under Rule 41, a Court of Appeals could properly withhold its mandate after the Supreme Court denied certiorari—in the case at hand, the Court of Appeals had abused any such arguable discretion by withholding the mandate (following the Court of Appeals' initial opinion against the accused and the Court of Appeals' denial of rehearing) without a formal order for more than 5 months after the Supreme Court had denied the accused's petition for certiorari and petition for rehearing.

BREYER, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting, expressed the view that under the unusual circumstances of the capital case at hand, the Court of Appeals did not abuse its discretion in its effort to correct its earlier decision, which the Court of Appeals perceived to have been mistaken.

**COUNSEL**

Jennifer L. Smith argued the cause for petitioner.  
Matthew Shors argued the cause for respondent.

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McCREARY COUNTY, KENTUCKY, et al., Petitioners

v

AMERICAN CIVIL LIBERTIES UNION OF KEN-  
TUCKY et al.

545 U.S. —, 162 L. Ed. 2d 729, 125 S. Ct. 2722

[No. 03-1693]

Argued March 2, 2005.

Decided June 27, 2005.

**Decision:** Federal District Court's preliminary injunction against display of Ten Commandments in each of two Kentucky county courthouses held properly granted; displays' religious purpose and evolving nature held properly evaluated by District Court.

## SUMMARY

In 1999, a copy of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus, was posted in each of two county courthouses in Kentucky. In the first county, the placement of the Ten Commandments responded to an order of the county legislative body requiring the display to be posted in "a very high traffic area" of the courthouse. In the second county, the Ten Commandments were hung in a ceremony that was presided over by the county judge-executive accompanied by a pastor.

A civil liberties organization brought suit against the counties in the United States District Court for the Eastern District of Kentucky. The suit sought a preliminary injunction against maintaining the displays, on the asserted ground that the displays violated the establish-

ment of religion clause of the Federal Constitution's First Amendment. Within a month of the suit's filing, the legislative body of each county authorized a second and expanded display, by nearly identical resolutions reciting that the Ten Commandments were "the precedent legal code" upon which the civil and criminal codes of Kentucky were founded, for among other matters, Kentucky's house of representatives had once voted to adjourn "in remembrance and honor of Jesus Christ, the Prince of Ethics." The second displays included the Ten Commandments plus eight other historical documents, each either having a religious theme or excerpted to highlight a religious element.

In 2000, the District Court (1) concluded that both the original and the second versions of the displays lacked a secular purpose, and (2) entered a preliminary injunction ordering that the displays be removed (96 F. Supp. 2d 679). Subsequently, the counties each installed a third display version consisting of (1) the Ten Commandments, explicitly identified as the "King James Version" at Exodus 20:3-17 and quoted at greater length than before; (2) eight other documents (mostly different from those in the second version) said to be "foundational" to American government; and (3) statements about the historical and legal significance of each document. This third display was mounted without new county resolutions or repeal of the old ones.

The District Court, in issuing a modified injunction to include the third display version, concluded that (1) the counties' objective of proclaiming the Commandments' foundational value was a religious, rather than secular, purpose; and (2) the assertion that the counties' broader educational goals were secular failed upon an examination of the history of the litigation at hand, in light of the counties' decisions to (a) post the Commandments by themselves in the first instance, and

(b) later accentuate the religious objective by surrounding the Commandments with specific references to Christianity (145 F. Supp. 2d 845).

The United States Court of Appeals for the Sixth Circuit, in affirming, expressed the view that (1) the counties' purpose was religious, not educational, given the nature of the Commandments as an active symbol of religion; and (2) the history of the litigation itself was evidence of the counties' religious objective (354 F. 3d 438, 2003 FED App. 447P).

On certiorari, the United States Supreme Court affirmed. In an opinion by SOUTER, J., joined by STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., it was held that:

- (1) The counties' purpose could properly be dispositive of the establishment of religion inquiry.
- (2) Evaluation of the counties' claim of secular purpose for the ultimate displays could properly take the evolution of those displays into account.
- (3) Under the circumstances presented, the District Court had properly issued the preliminary injunction, for (a) both the first and second versions of the display had presented a predominantly religious purpose, and (b) there was adequate evidence that the counties' purpose had not changed at the third stage.

O'CONNOR, J., concurring, expressed the view that (1) the Supreme Court had correctly found a violation of the establishment of religion clause, given the history of the particular display at issue; and (2) the purpose behind the counties' display was relevant, because an unmistakable message of endorsement of religion had been conveyed to the reasonable observer.

SCALIA, J., joined by REHNQUIST, Ch. J., and THOMAS, J., and joined in part (as to points 3 and 4 below) by KENNEDY, J., dissenting, expressed the view that (1)

there was a distance between the government's acknowledgment of a single Creator and the establishment of a religion; (2) publicly honoring the Ten Commandments was indistinguishable from publicly honoring God, as both practices were recognized across such a broad and diverse range of the population—from Christians to Muslims—that those practices could not be reasonably understood as a government endorsement of a particular religious viewpoint; (3) the Supreme Court had improperly converted the secular-purpose inquiry into a rigorous review of the full record; and (4) in the case at hand, no evidence had been identified of a purpose to advance religion in a way that was inconsistent with the Supreme Court's cases.

### COUNSEL

Matthew D. Staver argued the cause for petitioners.

Paul D. Clement argued the cause for the United States, as amicus curiae, by special leave of court.

David A. Friedman argued the cause for respondents.

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METRO-GOLDWYN-MAYER STUDIOS INC., et al.,  
Petitioners

v

GROKSTER, LTD., et al.

545 U.S. —, 162 L. Ed. 2d 781, 125 S. Ct. 2764

[No. 04-480]

Argued March 29, 2005.

Decided June 27, 2005.

**Decision:** One who distributes product, capable of lawful and unlawful use, with clearly shown object of promoting copyright infringement held liable for copyright infringement by third parties using product.

## SUMMARY

Two companies that distributed free software, which allowed computer users to share electronic files through peer-to-peer networks (that is, directly with each other, rather than through central servers), were sued by a group of copyright holders—who (1) alleged that the distributors had knowingly and intentionally distributed their software to enable users to infringe copyrighted works in violation of the Copyright Act (17 U.S.C.S. §§ 101 et seq.), and (2) sought damages and an injunction—where, although the distributors' software could be used to share any type of digital file, users of the software had mostly used it for unauthorized sharing of copyrighted music and video files.

Discovery revealed that (1) billions of files were shared across peer-to-peer networks each month; and (2) the distributors were aware that users of their

software used it primarily to download copyrighted files. Moreover, the record included evidence that the distributors (1) clearly had voiced the objective that software recipients use the software to download copyrighted works; and (2) had actively encouraged infringement by, for example, promoting themselves as alternatives to another file-sharing service that had been sued by copyright holders for allegedly facilitating copyright infringement.

Although the distributors received no revenue from users of their software, the distributors generated income by selling advertising space, and then streaming the advertising to the users (so that, as the number of users increased, the value of the distributors' advertising opportunities increased). There was no evidence that the distributors had tried to filter copyrighted material from users' downloads or otherwise to impede the sharing of copyrighted files.

The United States District Court for the Central District of California granted the distributors summary judgment. The United States Court of Appeals for the Ninth Circuit affirmed, as the Court of Appeals (1) read the United States Supreme Court's opinion in *Sony Corp. of America v. Universal City Studios, Inc.* (1984) 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774, reh den 465 U.S. 1112, 80 L. Ed. 2d 148, 104 S. Ct. 1619, concerning video cassette recorders, as holding that distribution of a commercial product that was capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge; and (2) found that (a) the distributors' software was capable of substantial noninfringing uses, and (b) because (as a result of the software's decentralized architecture) the

distributors had no actual knowledge of infringement, they were not liable for it (380 F.3d 1154).

On certiorari, the Supreme Court vacated and remanded. In an opinion by SOUTER, J., expressing the unanimous view of the court, it was held that:

- (1) One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable, under the Copyright Act, for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.
- (2) In the case at hand, summary judgment in favor of the software distributors was error, as there was substantial evidence against the distributors on all elements of inducement of infringement, for (a) each distributor had shown itself to be aiming to satisfy a known source of demand for copyright infringement; (b) the copyright holders had shown that neither distributor attempted to develop filtering tools or other mechanisms to diminish the infringing activity using the software; and (c) the more the software was used, the greater the distributors' revenue from advertisements on the screens of computers employing the software became.

GINSBURG, J., joined by REHNQUIST, Ch.J., and KENNEDY, J., concurring, expressed the view that (1) when the record in the case at hand had been developed, there had been evidence that (a) the distributors' software was, and had been for some time, overwhelmingly used to infringe, and (b) this infringement was the overwhelming source of the distributors' revenue from the software; and (2) fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or

commercially significant noninfringing uses for the software were likely to develop.

BREYER, J., joined by STEVENS and O'CONNOR, JJ., concurring, expressed the view that (1) the distributors' software was capable of substantial or commercially significant noninfringing uses, as the copyright holders' expert had declared that, of the current files available through the software, 75 percent were infringing and 15 percent were "likely infringing," which left some number of files near 10 percent that apparently were noninfringing; and (2) the record revealed a significant future market for noninfringing uses of the type of peer-to-peer software in question, for, as uncopyrighted information stored in swappable form increased, it seemed a likely inference that lawful peer-to-peer sharing would become increasingly prevalent.

### COUNSEL

Donald B. Verrilli, Jr. argued the cause for petitioners.

Paul D. Clement argued the cause for the United States, as amicus curiae, by special leave of court.

Richard G. Taranto argued the cause for respondents.

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NATIONAL CABLE & TELECOMMUNICATIONS  
ASSOCIATION, et al., Petitioners

v

BRAND X INTERNET SERVICES, et al. (04-277)

FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES, Petitioners

v

BRAND X INTERNET SERVICES, et al. (04-281)

545 U.S. —, 162 L. Ed. 2d 820, 125 S. Ct. 2688

Argued March 29, 2005.

Decided June 27, 2005.

**Decision:** Federal Communications Commission's conclusion, that cable companies' broadband Internet service was not "telecommunications service" under 47 U.S.C.S. § 153(46) subject to mandatory common-carrier regulation under 47 U.S.C.S. § 153(44), held lawful.

### SUMMARY

Under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 U.S.C.S. §§ 151 et seq.), (1) "telecommunications service" was defined, in 47 U.S.C.S. § 153(46), as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used"; (2) "telecommunications" was defined, in § 153(43), as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent

and received"; (3) "telecommunications carrier[s]"—those subjected to mandatory Title II common-carrier regulation—were defined, in § 153(44), as "provider[s] of telecommunications services"; and (4) "information service" was defined, in § 153(20), as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."

In 2002, when there were two principal kinds of "broadband" high-speed Internet services—(1) cable modem service, which transmitted data between the Internet and users' computers via the network of television cable lines owned by cable companies; and (2) Digital Subscriber Line (DSL) service, which used high-speed wires owned by local telephone companies—the Federal Communications Commission (FCC) issued a declaratory ruling stating that broadband cable modem service was an "information service" but not a "telecommunications service," so that it was not subject to mandatory Title II common-carrier regulation.

After numerous parties challenged the FCC's ruling, the United States Court of Appeals for the Ninth Circuit was selected, by judicial lottery, as the venue for the challenges. The Court of Appeals vacated the FCC's ruling to the extent that the ruling had concluded that cable modem service was not telecommunications service under the Communications Act, as the Court of Appeals—in holding that the FCC's statutory construction was impermissible—rather than analyzing the permissibility issue under the deferential framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (1984) 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778, relied on the purported precedential effect of the Court of Appeals' decision in an earlier case in

which the Court of Appeals had held that cable modem service was a “telecommunications service” (345 F. 3d 1120).

On certiorari, the Supreme Court reversed and remanded. In an opinion by THOMAS, J., joined by REHNQUIST, Ch. J., and STEVENS, O’CONNOR, KENNEDY, and BREYER, JJ., it was held that the FCC’s ruling, stating that cable companies’ broadband Internet service was not “telecommunications service” under § 153(46) subject to mandatory common-carrier regulation under § 153(44), was a permissible construction of the Communications Act, as:

- (1) The Chevron framework—under which a federal court (a) asked whether a statute’s plain terms directly addressed the precise question at issue, and (b) if the statute was ambiguous on the point, then deferred to the agency’s interpretation—was applicable to the FCC’s interpretation of the term “telecommunications service.”
- (2) The FCC’s construction was a permissible under Chevron, for (a) the statutory term “telecommunications service” was ambiguous; and (b) the FCC’s construction was a reasonable policy choice.
- (3) Nothing in the Administrative Procedure Act (5 U.S.C.S. §§ 555 et seq.) made the FCC’s construction unlawful, for the construction did not constitute an arbitrary and capricious deviation from agency policy under 5 U.S.C.S. § 706(2)(A).

STEVENS, J., concurring, expressed the view that an explanation in the Supreme Court’s opinion in the consolidated cases at hand—as to why a Court of Appeals’ interpretation of an ambiguous provision in a regulatory statute did not foreclose a contrary reading by the administrative agency authorized to implement the statute—would not necessarily be applicable to a

Supreme Court decision that would presumably remove any pre-existing ambiguity.

BREYER, J., concurring, expressed the view that an administrative agency's action qualified for Chevron deference when Congress had explicitly or implicitly delegated to the agency the authority to "fill" a statutory "gap," including an interpretive gap created through an ambiguity in the language of a statute's provisions.

SCALIA, J., joined in pertinent part by SOUTER and GINSBURG, JJ., dissenting, expressed the view that (1) the relevant question in the cases at hand was whether the individual components in a package being offered (a) still possessed sufficient identity to be described as separate objects of the offer, or (b) had been so changed by their combination with the other components that it was no longer reasonable to describe them in that way; and (2) someone who sold cable modem service was "offering" telecommunications.

### COUNSEL

Thomas G. Hungar argued the cause for petitioners in No. 04-281.

Paul T. Cappuccio argued the cause for petitioners in No. 04-277.

Thomas C. Goldstein argued the cause for respondents.

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## **GLOSSARY OF COMMON LEGAL TERMS**

### **Abatement**

The extinguishment of a lawsuit.

### **Abstention doctrine**

The doctrine whereby a federal court may decline to exercise, or may postpone the exercise of, its jurisdiction, where a case involves a controlling question of state law.

### **Action**

A lawsuit.

### **Administrative determination**

A decision by a government board, agency or official, rather than by a court.

### **Administrator**

One appointed by a court to settle the estate of a deceased person. The feminine form is "administratrix."

### **Admiralty**

The body of law governing maritime cases.

### **Affidavit**

A sworn written statement.

### **Amicus curiae**

One who, not being a party to a lawsuit, assists the court in deciding the case.

### **Antitrust laws**

Laws prohibiting restrictions on competition.

### **Appealable**

That which may be taken to a higher court for review.

**Appellant**

One who appeals to a superior court from the order of an inferior court.

**Appellee**

A party against whom a case is appealed from an inferior court to a superior court.

**Arbitration**

The submission of a dispute to a selected person—not a court—for decision.

**Arraign**

To call a person before a judge or commissioner to answer criminal charges made against him.

**Array**

The whole body of persons, summoned to attend court, from whom a jury will be selected.

**Assignee**

One to whom property or a right is transferred.

**Assignor**

The transferor of property or a right.

**Bill of Rights**

The first ten amendments to the United States Constitution.

**Brief**

A written legal argument submitted to the court deciding the case.

**Calendar**

A list of cases awaiting decision in a court.

**Capital crime**

An offense punishable by death.

**Cause of action**

A right to legal redress.

## GLOSSARY

**Cease-and-desist order**

An order to stop doing specified acts.

**Certiorari**

A superior court's order to a lower court to send up the record of a case for review by the superior court.

**Choice of remedies**

An election of which form of legal redress to seek.

**Civil**

Not criminal, as a civil lawsuit.

**Class action**

A lawsuit on behalf of persons too numerous to participate actively therein.

**Commerce clause**

The provision of the United States Constitution giving Congress power to regulate commerce with foreign nations, among the states.

**Common law**

The body of the law apart from constitutions, treaties, statutes, ordinances, and regulations.

**Contempt**

An exhibition of scorn or disrespect toward a judicial or legislative body.

**Continuance**

A postponement of proceedings.

**Copyright**

The exclusive privilege of publishing literary or artistic productions.

**Coram nobis**

A means of challenging a court's judgment, especially in criminal cases.

**Court of Appeals**

See United States Court of Appeals.

**Cross Appeal**

An appeal filed by the person against whom an appeal is taken.

**De novo**

Anew or over again, such as a trial de novo.

**Devise**

A will provision making a gift of land.

**Disputes clause**

A provision in a government contract for the settlement of disputes between the contractor and the government by decision of a government board or official.

**District court**

See United States District Court.

**Diversity case**

A case decided by a federal court because the parties are citizens of different states.

**Double jeopardy**

Placing a person twice in jeopardy of conviction for the same offense.

**Due process clause**

The provision of the United States Constitution that no person shall be deprived of life, liberty, or property without due process of law.

**En banc**

With all the judges of the court sitting.

**Equal protection**

The guaranty of the United States Constitution that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or classes of persons in like circumstances.

## GLOSSARY

### **Establishment clause**

The provision of the United States Constitution that Congress shall make no law respecting an establishment of religion.

### **Federal District Court**

See District court.

### **Federal question jurisdiction**

The jurisdiction of federal courts over cases presenting questions of federal law.

### **Felony**

A crime punishable by death or by imprisonment in a state prison.

### **Forma pauperis**

Without the payment of legal fees in advance.

### **Full faith and credit clause**

The provision of the United States Constitution that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

### **Habeas corpus**

A judicial inquiry into the legality of the restraint of a person.

### **Indictment**

A grand jury's accusation of crime.

### **Interlocutory**

That which settles an intervening matter but does not decide a case.

### **Intestate**

One who dies without leaving a valid will.

### **Jurisdiction of subject matter**

The power to decide a certain type of case.

**Just compensation clause**

The provision of the United States Constitution that no private property may be taken for public use without just compensation.

**Laches**

Delay barring the right to special forms of relief.

**Legatee**

One to whom personal property is given by will.

**Lessee**

A tenant.

**Lessor**

A landlord.

**Libel**

Written defamation; in maritime cases, a suit in court.

**Lien**

A charge upon property for the payment of a debt.

**Local action**

A lawsuit, especially one involving rights to land, which can be brought only in the place where the wrong was committed.

**Maintenance and cure**

The legal duty of a seaman's employer to care for him during his illness.

**Mandamus**

A judicial command to perform an official duty.

**Misdemeanor**

Any crime not punishable by death or by imprisonment in a state prison.

## GLOSSARY

**Patent**

The exclusive right of manufacture, sale, or use secured by statute to one who invents or discovers a new and useful device or process.

**Per curiam**

By the court as a whole.

**Per se**

By itself.

**Plaintiff**

A person who brings a lawsuit.

**Plenary**

Full or complete.

**Police power**

The power inherent in the states as sovereigns and not derived under any written constitution.

**Prima facie**

At first sight; with regard to evidence, that which, if unexplained or uncontradicted, is sufficient to establish a fact.

**Privileges and immunities clause**

The provision of the United States Constitution that no state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States.

**Pro hac vice**

For this occasion.

**Pro se**

For himself; in his own behalf.

**Proximate cause**

The immediate cause of injury.

**Public defender**

A lawyer employed by the public to defend persons accused of crime.

**Recognizance**

A bail bond.

**Remand**

To order to be sent back.

**Res judicata**

The doctrine that a final judgment is binding on the parties to the lawsuit and the matter cannot be relitigated.

**Respondent**

The defendant in an action; with regard to appeals, the party against whom the appeal is taken.

**Sanction**

The penalty to be incurred by a wrongdoer.

**Saving clause**

A statutory provision preserving rights which would otherwise be annihilated by the statute.

**Seaworthy**

The reasonable fitness of a vessel to perform the service which she has undertaken to perform.

**Statute of frauds**

A statute rendering certain types of contracts unenforceable unless in writing.

**Statute of limitations**

A statute fixing a period of time within which certain types of lawsuits or criminal prosecutions must be begun.

**Subpoena**

Legal process to require the attendance of a witness.

## GLOSSARY

### **Substantial federal question**

A question of federal law of sufficient merit to warrant decision of the case by a federal court.

### **Substantive offense**

An offense which is complete in itself and does not depend on the establishment of another offense.

### **Summary judgment**

A judgment without a trial.

### **Supremacy clause**

The provision of the United States Constitution that the Constitution, federal laws enacted pursuant thereto, and federal treaties shall be the supreme law of the land, binding the judges in every state, notwithstanding any state law to the contrary.

### **Surety**

One who binds himself with another, called the principal, for the performance of an obligation with respect to which the principal is already bound and primarily liable.

### **Surrogate**

The judge of a court dealing largely with wills and decedents' estates.

### **Tort**

A wrong independent of contract; a breach of duty which the law, as distinguished from a mere contract, has imposed.

### **Tortfeasor**

One who commits a tort; a wrongdoer.

### **Transitory action**

An action which may be brought wherever the defendant may be served with process.

**Trespass**

An injury intentionally inflicted on the person or property of another.

**Trier of fact**

One who decides questions of fact.

**United States Code**

The official compilation of statutes enacted by Congress.

**United States Court of Appeals**

The intermediate level of federal courts above the United States District Courts but below the Supreme Court of the United States.

**United States District Court**

A federal trial court.

**Unseaworthy**

See Seaworthy.

**USC**

See United States Code.

**USCS**

The abbreviation for United States Code Service, Lawyers Edition, which is a publication annotating the federal laws, arranged according to the numbering of the United States Code.

**Venue**

The place where a case may be tried.

**Writ of certiorari**

See Certiorari.

**Writ of error coram nobis**

See Coram nobis.

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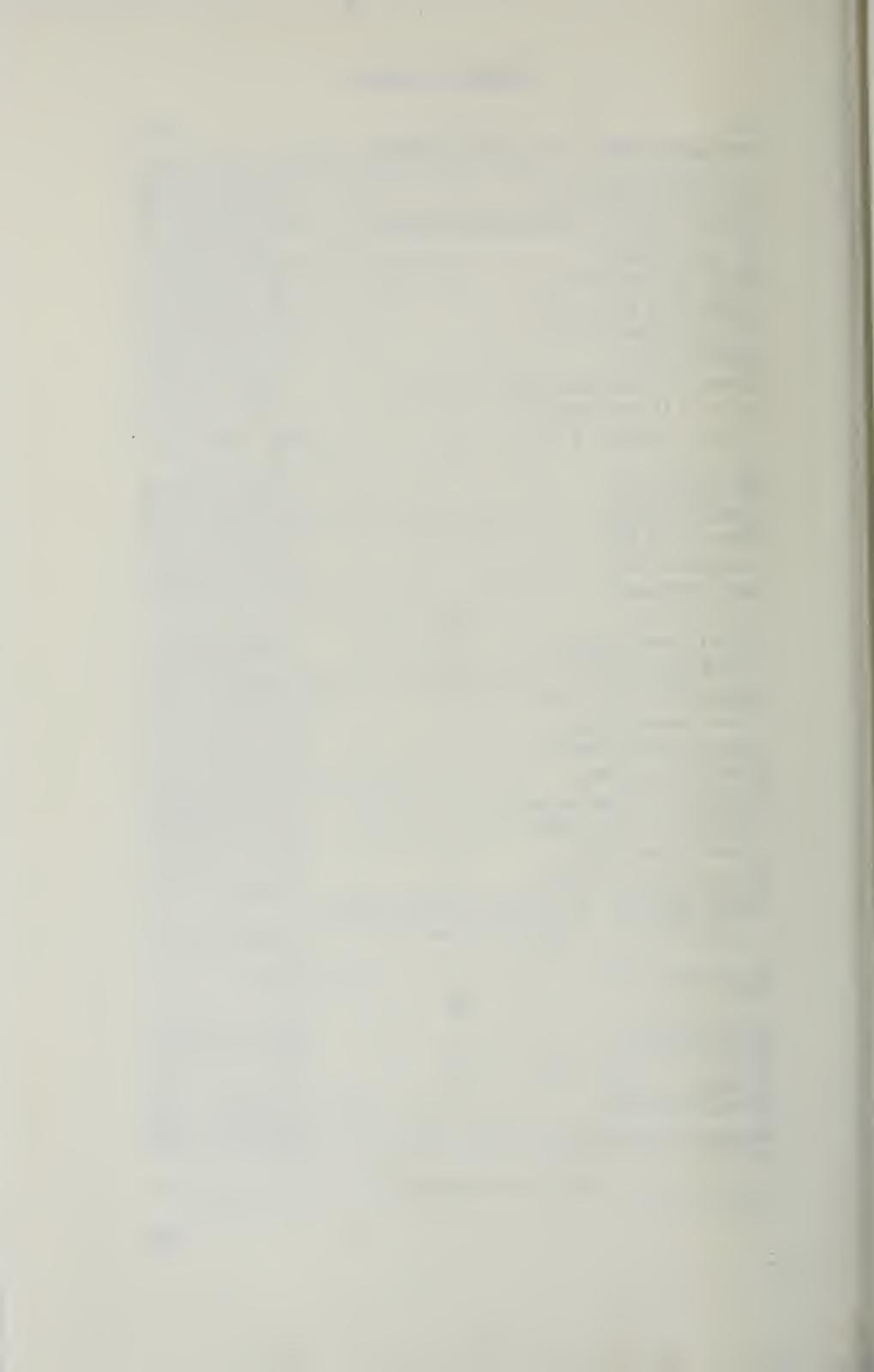
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